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HOW SMALL BUSINESSES BENEFIT FROM SMART RAIL SHIPPING REGULATION

FIELD HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

NOVEMBER 16, 2018

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HOW SMALL BUSINESSES BENEFIT FROM SMART RAIL SHIPPING REGULATION

FRIDAY, NOVEMBER 16, 2018

UNITED STATES SENATE,
COMMITTEE ON SMALL BUSINESS
AND ENTREPRENEURSHIP,
New Orleans, LA.

The Committee met, pursuant to notice, at 10:00 a.m., at the Port of New Orleans Auditorium, 1350 Port of New Orleans Place, New Orleans, LA 70130, Hon. John Kennedy, presiding.

Present: Senator Kennedy.

OPENING STATEMENT OF HON. JOHN KENNEDY, A U.S. SENATOR FROM LOUISIANA

Senator KENNEDY. Alright, folks, I'm going to call this meeting of the—our field hearing of the U.S. Senate Committee on Small Business and Entrepreneurship to order.

We'll start, if you will join me, standing for the pledge.

[All recite the Pledge of the Allegiance.]

Thanks everybody for coming. Thanks, in particular, to our panelists here.

I'm looking forward to this. I hope we all learn something today.

I don't want this to be too formal. The way I thought we would approach it is I want to have a few remarks. They will be limited.

And then I'm going to introduce our panelists.

We had originally thought we would do two panels, but that didn't make much sense to me. So, we have a reasonable number of folks with expertise here that we would want to hear from. So, I just said, well, we'll do it all in one panel.

After I give my opening remarks, we'll start from my right and go to the left.

I have, I thank all of our witnesses, if you will. It sounds too formal, our panel members, for submitting their written testimony ahead of time. It was very good. I learned a lot reading it.

I want to thank everybody for coming.

Throughout, and we all know this, throughout American history railroads have helped our country grow and have helped our economy flourish. We wouldn't have the strongest economy of all of human history without our railroads.

I deeply appreciate Chairman Risch and Ranking Member Cardin of the United States Committee on Small Business and Entrepreneurship for allowing me to take the Committee on the road to talk about these important issues today. I wanted to hear directly from our friends in the railroad industry, our friends in government, our shippers and our small business people about the issues that they're facing as they rely on America's railroads for commercial success.

Before I begin, I want to thank Meredith West, Louisiana native, our Committee's Deputy Staff Director. Where's Meredith?

Right there, right in front of them, for all her hard work as we prepared for this hearing.

We all had a little trouble getting out of Washington, DC. When it snows there, everybody panics and it unexpectedly snowed yesterday and they ran out of fluid to de-ice the planes at the airport. So, some of us had a little trouble getting in and I want to thank everybody for their perseverance.

I also want to thank and with us today, we have Louisiana native, Kathryn Eden.

Kathryn, there you are, who works for Chairman Risch.

Sean Moore. Sean, are you? There's Sean. Sean is the Staff Director for Ranking Member Cardin.

And I want to thank all of them for their hard work in putting this together.

I want to thank my staff: Marcie, Cassie. Raise your hands.

Preston Robinson, my Chief of Staff is here.

Ross White. Where's Ross? Ross is here.

I saw Michelle come in. Michelle is in the back, Michelle Millhollon.

I want to thank them for all their hard work in putting this together as well.

For many small businesses across this country, rail transportation is a key ingredient to their success. Railroads play a vital role in many industries in Louisiana. I'm thinking agriculture, crude oil, chemicals, water infrastructure.

Our railroads aid in sending and receiving goods and supplies.

Our railroads create high-paying jobs in Louisiana's towns.

Our railroads generate revenue for the local and the State economy and we're grateful for every single penny.

I think in 2017 alone, rail supported roughly 650 thousand jobs in Louisiana, carried 174 billion dollars in freight worldwide and those, of course, our job figures are not just for Louisiana. They're from America that those are really impressive numbers. And I want to thank our friends in the railroad industry.

I called this hearing because I want to have a very frank discussion today. I want to encourage, after we're all done, this is off script a little bit but people in the audience have comments they want to make. I certainly would like to hear them.

I want to talk about some of the issues facing both our shippers and our railroads.

Our witnesses today, for the most part, this isn't their exclusive area of expertise, but they certainly know the relationship between small businesses and rail shipping, first-hand.

They use railways to grow their businesses. Small businesses rely substantially on railroads to create jobs and help their communities thrive and I can think of no better way for Congress to grab an accurate understanding of the benefits and challenges facing Louisiana small businesses than by lending these folks an ear.

Each and every year Louisiana railroads carry about 121 million tons of freight.

Let me say that again.

Every year, Louisiana railroads carry about 121 million tons of freight. They're important to our economy.

Throughout our State, farm servicers, manufacturers, port authorities, depend on efficient modes of transportation to get their cargo where it needs to go. Products grown and produced in Louisiana end up on the shelves of Rouses and other grocery stores across America. Small businesses and consumers alike use railroads to keep these goods affordable.

For those same farmers and in some cases, chemical producers, as well as other Louisiana businesses, frankly, large and small, the issue of regulatory authority is critically important. I want to make sure that we spend some time today talking about smart regulations that will help our businesses thrive and keep our communities safe.

For example, and we'll be talking about this. I know that the latest proposed safety regulations on tank cars that ship Toxic Inhalation Hazards or TIH materials as we call them, will impact job creators all throughout Louisiana.

I'm a big fan of our Transportation Secretary. I sent her a letter, Secretary Chao, a letter last year asking her to move forward with a regulation to determine a phase-out period for tank cars that don't meet the latest safety standards.

She and I worked very well together on this issue, as we have on others. She and I worked with the shippers and our railroads and I'm pleased to say that an agreement was reached on a reasonable phase-out date.

This new phase-out date will make sure that safety is a top priority. That's our first and foremost concern while also saving shippers and tank car owners about 130 million dollars.

The Department of Transportation is working on noticing a proposed rule and I'm looking forward today to hearing an update on—of where this stands. We need it like, yesterday.

If small businesses across Louisiana and America are going to succeed, they need to be able to transport their materials and goods safely, reliably, but also affordably. And that's why it's vital to Congress and while I don't speak for her, I think it's vital, it would be safe to say, that it's vital to the Trump Administration that we continue working together to promote competition and grow our economy.

Our panel today.

Our panel is made up of representatives from a few of Louisiana's many industries. I'm looking forward to hearing their testimony.

Unfortunately, we don't have time today to hear from every single business that ships by rail so we tried to pick a representative sample, if you will. But our witnesses today are key leaders in their communities and industries and I know we will all find their testimony to be interesting and informative.

I do plan to take what I hear today back to the rest of the Committee and talk to my colleagues to make sure that all the concerns expressed today from our panel members and from any of you here who express concerns from the audience so we can decide what or any legislation we should pursue.

Alright, witness testimony.

I'm going to introduce our panel today, in no particular order.

I'm trying to start with Renee.

Ms. Renee Amar, did I say that right?

Ms. AMAR. Absolutely.

Senator KENNEDY. Renee is Director of Small Business at the Louisiana Association of Business and Industry which, of course, is no stranger to most of us.

Renee is the Small Business Council Director and Healthcare Council Director for LABI.

And in the role as Deputy Director of Political Action, she fundraises for LABI's four pacs, recruits candidates for office and develops endorsements.

Prior to joining LABI in 2013, Renee spent eight years as the Director, the State Director, for the National Federation of Independent Businesses.

She also worked for Louisiana Hospital Association for four years in the Governmental Affairs Department.

She holds a Bachelor's Degree from Southeastern Louisiana University and a Master's Degree from Louisiana State University.

She lives in Baton Rouge with her husband and three children.

Renee, we'll start with you and then we'll go next to John and I'll introduce John when you've completed your remarks.

Ms. AMAR. Absolutely.

Senator KENNEDY. What I thought we would do is just let everybody speak and then I'm going to go back and ask some questions and I would welcome the audience, audience questions or participation as well. We'll just talk about the issues that our esteemed panelists will raise, okay.

Renee, the floor is yours.

STATEMENT OF RENEE AMAR, DIRECTOR, SMALL BUSINESS, LOUISIANA ASSOCIATION OF BUSINESS AND INDUSTRY (LABI), BATON ROUGE, LA

Ms. AMAR. Thank you. Good morning, everyone. As Senator Kennedy said my name is Renee Amar with the Louisiana Association of Business and Industry.

In this beautiful weather I don't understand that I woke up this morning with allergies and it's like somebody punched me in the face. So, I apologize for my voice and my eyes and everything before I even get started.

Senator Kennedy, on behalf of the Senate Committee on Small Business and Entrepreneurship, thank you so much for inviting the Louisiana Association of Business and Industry to testify today at this hearing, "How Small Businesses Benefit from Smart Rail Shipping Regulation."

Hopefully, once this hearing is completed, all the parties involved can come to a reasonable and timely solution for this smart rail shipping regulation that is safe, reliable and affordable for the small business community.

My name is Renee Amar, as I said, and I am the Director of Small Business for LABI. LABI, if you don't know, is the State's

Chamber of Commerce and manufacturing association. We work very closely with the National Association of Manufacturers and the U.S. Chamber of Commerce. We are the State's largest business organization, and a voice for the principles of free enterprise in Louisiana.

We represent the views and interests of the Louisiana business community in the political, legislative, judicial and regulatory processes.

We currently have 2,400 members that represent more than 320,000 employees. Of those 2,400 members, more than 70 percent are small business owners defined as having under 100 employees.

We get tagged a lot of time, this is not in my testimony, but for being the voice for big business, but obviously, the lion's share of our members are small business owners. These are your farmers, your retailers, both grocery and clothing, as Senator Kennedy said, we obviously have large manufacturers as our members, but we also have small manufacturers as our members.

And in full disclosure, we have railroads as our members. And so, I'm going to have to kind of thread the needle a little bit today, understanding, you know, both sides of this issue.

Specifically, as the Small Business Council Director, my job is to advance ideas that help the free market grow in Louisiana which in turn, allows small business owners to compete in a healthy environment. We understand the vital role that the small business community plays in Louisiana's economy and we equally understand that the growth of the economy in Louisiana greatly depends on maintaining a healthy and thriving industrial base, coupled with a thriving small business community. Also, having cost effective shipping options is a vitally important piece of the puzzle for running a successful small business of any type.

It's clear then that when rail is healthy, profitable and productive, that it's good news for all of us and of course, that's good news for the small business community. And, that goes for every sector and every small business as they are consumers in general and benefit from the savings and improved service generated by a competitive, innovative transportation sector.

Looking ahead, it is important that the best policy environment be established to incentivize entrepreneurship, investment and innovation that drives growth across the entire economy, including when it comes to transportation. Any relapse into overregulation, in turn, would generate negatives, such as higher costs and reduced service, for the small businesses in the broader railroad sector, in sectors that serve the railroads, and in the many sectors served by railroads and of course, for consumers in general.

Pointing to the issue of rail and regulation, after much has been said and done, both sides of rail and industry have come together and reached common ground and we believe that is the best conclusion to come to as it works for the rail companies, it works for industry and ultimately, it works for the consumer.

The consumer benefits from years of railroad deregulation and not overregulation to the tune of billions of dollars that come from lower priced goods resulting from lower transportation costs.

In conclusion, we always, LABI, myself, have cautioned and always will caution that when government does issue regulations because there truly is a safety or health concern, it should be done with the business owners' input and with the lightest touch from government as humanly possible.

Thank you today for allowing me to come and participate in this hearing.

[The prepared statement of Ms. Amar follows:]

Renee Amar
Director, Small Business
Louisiana Association of Business and Industry
November 16, 2018
Port of New Orleans

TESTIMONY SENATOR JOHN KENNEDY

Senator Kennedy on behalf of the Senate Committee on Small Business and Entrepreneurship, thank you for inviting the Louisiana Association of Business and Industry to testify today at this hearing, "How Small Businesses Benefit from Smart Rail Shipping Regulation." Hopefully, once this hearing is completed, all the parties involved can come to a reasonable and timely solution for this smart rail shipping regulation that is safe, reliable and affordable for the small business community.

My name is Renee Amar, I am the Director of Small Business for the Louisiana Association of Business and Industry, also known as LABI. LABI is the state's Chamber of Commerce and state's manufacturing association. We work very closely with the National Association of Manufacturers and the United States Chamber of Commerce. LABI is the state's largest business organization, and a voice for the principles of free enterprise in Louisiana. We represent the views and interests of the Louisiana business community in the political, legislative, judicial and regulatory processes.

LABI currently has 2,400 members representing more than 320,000 employees and of those 2,400 members, more than 70% are small business owners and that is defined as having under 100 employees. These are your farmers, retailers both grocery and clothing, and small manufacturers that all rely on rail as a form of shipping for them.

Specifically, as the Small Business Council Director, my job is to advance ideas that help the free market grow in Louisiana which in turn, allows small business owners to compete in a healthy environment. We understand the vital role that the small business community plays in Louisiana's economy and equally understand that the growth of the economy in Louisiana will greatly depend on maintaining a healthy industrial base, coupled with a thriving small business community. Also, having cost effective shipping options is a vitally important piece of the puzzle for running a successful small business of any type.

It is clear then that when rail is healthy, profitable and productive, that's good news for all of us – and of course – that's good news for small businesses. And, that goes for every sector and every small business as they are consumers in general and benefit from the savings and improved service generated by a competitive, innovative transportation sector.

Looking ahead, it is important that the best policy environment be established to incentivize the entrepreneurship, investment and innovation that drive growth across the economy, including when it comes to transportation. Any relapse into over-regulation, in turn, would generate negatives, such as higher costs and reduced service, for the small businesses in the broader railroad sector, in sectors serving railroads, and in the many sectors served by railroads – and of course, for consumers in general.

Pointing to the issue of rail and regulation, after much has been said and done, both sides of rail and industry have come together and reached common ground and we believe that this is the best conclusion to come to as it works for the rail companies, works for industry and ultimately, the consumer. The consumer benefits from years of railroad deregulation and not over-

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In conclusion, we always have cautioned and always will caution that when government does issue regulation because there truly is a safety or health concern, it should be done with the business owners input and with the lightest touch from government as humanly possible.

Thank you for your time and the opportunity to testify today.

Senator KENNEDY. Thanks, Renee.

Mr. John McIntosh. John is our next panelist.

John is the Executive Vice President, Chemical Synergies and Systems for Olin Corporation.

In this role, as Executive Vice President, John has the overall operational responsibility for chloralkaline products and chemical distribution. He also has corporate responsibility for information technology.

John joined Olin in 1977. He's been appointed to several roles in manufacturing and operations since then, including Vice President of Operations for Specialty Chemicals, Vice President of Manufacturing and Engineering, President of a Products Division, Senior Vice President of Operations, Senior Vice President of Chemicals and Executive Vice President of Chemicals and Ammunition.

Mr. McIntosh is currently Chair of the World Chlorine Council which, as you know, is an international consortium of trade associations.

John is a graduate in chemical engineering from the University of Missouri, some say Missouri, I know.

My roommate in law school went to "Missou," as he called it and he told me always to say, "Missoura." But Senator Blunt, my friend from Missouri, says it's Missouri, but John can tell us what's right here. He has a very impressive background and "Missou" is a great school.

STATEMENT OF JOHN McINTOSH, EXECUTIVE VICE PRESIDENT, OLIN CORPORATION, CLAYTON, MO

Mr. MCINTOSH. Thank you, Senator.

I was always taught that if you lived south of the Missouri River in the Ozarks it was Missouri and if you lived north, it was "Missoura." There's no truth to that either, that was just——

[Laughter.]

Senator, thank you for having this hearing and for inviting us to testify.

As the Senator said, my name is John McIntosh. I am an Executive Vice President for Olin Corporation.

I have worked for many different roles for Olin since I started with the company in 1977 and I've been involved in transportation policy or transportation operations for much of that time.

I also want to express my gratitude to the Senator for his part in the agreement that we ultimately reached on a solution to the phase out of tank cars. His part in that was much more than his remarks would have indicated and we would not have been able to get to the point we got to without his intervention and his stewardship of that issue through, you know, through the process that we went through.

All of those efforts, including the things that he's talked about, obviously, and the things we'll talk about in this hearing, will result in economic benefit for small businesses across Louisiana and across the entire country.

Olin is a chemical company, ships about 45,000 rail cars annually, and we take pride in doing that safely. We've been awarded the American Association of Railroad's Grand Slam safety transportation award for the last three years. Winning once is an accomplishment. Winning three years in a row is truly an exceptional feat and within our company it's one of the demonstrations we have of our commitment, not only to distribution safety but to product safety and to the safety of our workplaces.

Olin is the world's largest chlorine producer, the world's largest manufacturer of epoxy and as the Senator said, a leading ammunition company selling product under the Winchester brand.

We have nearly 700 employees that work, employees and contractors that work in our two sites in Louisiana, in Plaquemine and St. Gabriel. Louisiana is critical to our network of facilities and our portfolio of customers that we serve. We have plans to invest in the State because these are both viable locations with many advantages and opportunities as we look forward.

We are not a small business, obviously. But if you look at our portfolio of customers, you'll find that the majority of our customers are, in fact, small businesses and they rely on timely and economic delivery of chlorine and chlorine related chemistries, products made with chlorine, to do their business. And so, that's what's key to this. Chlorine is used everywhere. It's ubiquitous. It's involved in things we take for granted every day.

It makes sure our drinking water is safe. It makes sure that restaurants, nursing homes, hospitals, anyplace where health care is the object that all of the sanitization and disinfection chemicals that are necessary to safely operate in those facilities, in essence, come from chlorine or a derivative of chlorine.

You all encounter our products every day, breweries, food producers, hair salons, dry cleaners, thousands of other businesses use our products and derivative products is just a raw material supplied for their everyday business.

Unfortunately, for shippers like Olin that have only access to only one serving railroad, in other words, we do not have competition for the railroads that we can look to, to move product for us, what we encounter is, in essence, a natural monopoly that exists because of what we believe are overly permissive laws and regulations.

Our rate increases, if you look historically, for the last 15 years have far exceeded the rate of inflation on an annual basis and our service levels have not matched that kind of rate profile. Our surface levels have been in continuous decline with periodic catastrophic service emergencies. Unfortunately, we have virtually no recourse under current law because the checks Congress put in place, historically went all the way back to the Stagger's Act, are simply not functional in today's environment.

Olin is one of the few chemical companies who has availed itself of the rate review process or rate reasonableness process that is under the jurisdiction of the STB, the Surface Transportation Board. We spent millions of dollars and many years trying under that protocol for rate reasonableness to put together, in essence, a case that said we were being overcharged from a rate standpoint.

We, obviously, were not successful or we wouldn't be talking about the shortcomings of that protocol.

To say the process is a disincentive for companies to avail themselves of this rate reasonableness process with the STB is an understatement.

At the end of this process, my interpretation, having been the one that convinced the company to spend these millions of dollars in search of more reasonable rail rates, my interpretation of that decision and all that went into it is that the current STB process for rate reasonableness will never allow a shipper, just because of the protocol and the way that it's executed, to win a rate case.

Until the STB makes serious reforms to their processes, we really don't have a recourse for great reasonableness. And as I mentioned earlier, if you're served by only one railroad, you do not have competition as an economic check and balance on the rates that the railroad is charging.

To make matters worse, in recent years we've also experienced serious cuts in services and investment in the rail network, not universally, but in some areas, in some geographies. And you know, that puts further pressure on our ability to rely on and the small business customer at the end of the supply chain, to rely on, you know, our ability to serve them and consequently, their ability to produce the products that are for the markets that they serve.

In some cases, this can mostly be traced back to a trend that began when activist investors installed Hunter Harrison as CEO of CSX Railroad. The resulting change in the operating practices at CSX created serious service breakdowns, not only for us, but for really, anybody else that was using them as a primary rail carrier.

Obviously, as I said earlier, at the other end of this supply chain is a customer, whether it's a large company, a small company, at the other end of the supply chain and those people, ultimately being the customer facing part of the supply chain are impacted as well.

Anecdotally, during the worst of this crisis, we had rail cars that took 40 days to go from the southeast U.S. to the northeast U.S. We lost track of rail cars. The railroads didn't know where rail cars were that we had entrusted them to ship on a timely basis to an end point.

We have installed GPS trackers on our rail cars. We can typically always find out where our rail cars are, but that, in and of itself, was not enough to counter the fact that we just had a slowdown in rail traffic on their system and it was so overwhelming that it took a long time to work ourselves out of it.

Most of us have had consumer-related, you know, service problems like that, but when it's as extensive as this one was, it creates a level of frustration.

I will acknowledge that the situation with CSX, you know, has improved, not back to the baseline we started, but it's improved with another change in management, but the damage to the economy, the damage to the customers, both primary and downstream customers, was significant and the sad part is there were no consequences, virtually, for this kind of service slow down.

Most other railroads, because there appears to be a potential opportunity and no downside, are migrating towards this new operating model which we fear will have similar impacts in geographies across the country where these other railroads are going to operate.

When you have a network that's already thinly resourced, these kinds of events put a serious strain on that industry's ability to react. Service problems are not just inconvenient, they are threatening to the entire framework of our customers.

And anecdotally, there are many examples.

Our plants run 24/7 and because of that it's a fine balance for us between how much we produce which is reliant, almost totally, on how much we can ship and ship reliably. And when that balance gets disrupted, then even us, as the primary, you know, manufacturer in a supply chain process, gets impacted. If a customer doesn't receive a product when they expect, then they're impacted as well.

In some cases when you're talking about chemicals that aren't chlorine, we can step in with alternate modes of transportation. We can, at great expense, move trucks, but that's not a long term and sustainable option to the importance of rail transportation in our supply chain.

In this last CSX service issue that I spoke to, we had customers all up and down the eastern U.S. which is predominately CSX's service territory, that either were shut down because they couldn't get product or shut down because, you know, the rail car system was just broken. Cars were not being returned to be reconditioned and refilled and shipped again. These anecdotal incidents, you know, happened in every State in the eastern U.S. that we serve customers.

And so, we believe the STB, and have said this on numerous occasions, should look at service requirements as part of the railroad's common carrier obligation.

The Senator mentioned the Tank Car Committee. There have been issues with the Tank Car Committee. He mentioned one about the Tank Car Committee standards that were unilaterally chosen to be changed by the Tank Car Committee which is an industry-controlled subcommittee that's part of the American Association of Railroads organization.

We're vested in policies that focus on safe and reliable transportation of material by car. We own or lease our entire fleet. We have a huge investment tied up in these assets.

And we believe that the rulemaking authority for what standards are appropriate for the assets we use is an authority that belongs with DOT, not with an industry-controlled, railroad industry-controlled, Tank Car Committee.

We would ask the Committee's assistance in requesting the DOT grant the rail shipper's petition, filed more than two years ago, to initiate a rulemaking that would allow for discussion on Tank Car Committee reform and on the standard setting by that group.

We also believe that DOT needs to be the standard-setting agency and we would like to suggest that legislation should be enacted to make that.

The Tank Car Committee is imposing many new requirements on us, not only, not just tank car standards. They're currently involved in an activity to update standards around certification of tank car facilities, otherwise known as Appendix B.

Appendix B is driven by, well, if these new regulations are, in essence, happen, then it's going to change the dynamic around how many times rail cars have to go back to shops for repairs versus having those repairs done on the site which is how it's been handled historically for years and years.

This new regulation will take rail cars out of service. It will impact the nature and the productive use of the fleets of the shippers and ultimately it will impact the small business customer who relies on this supply chain to work right.

We believe that the DOT and FRA should issue an interpretation that minimizes the regulatory burdens of Appendix B without compromising the Department's, you know, highest priority standard of safety. We support that, but the fact that this has all been done just with informal, non-rulemaking activities has led to this review of Appendix B has created a potential problem for us.

Senator, again, I want to thank you for this hearing today. You've been an ally of the shipper community and we recognize that. I think the small business community in Louisiana recognizes that as well.

We will continue to look forward working with you and your staff.

Thank you, sir.

[The prepared statement of Mr. McIntosh follows:]

Testimony of:

John McIntosh
Executive Vice President
Olin Corporation

Before the
United States Senate
Committee on Small Business & Entrepreneurship

Field Hearing on
"How Small Businesses Benefit from Smart Shipping Regulation"

Port of New Orleans
November 16, 1018

John McIntosh
Executive Vice President
Olin Corporation

Senator Kennedy and members of the Committee, thank you for inviting me to provide testimony today.

My name is John McIntosh, and I am the Executive Vice President for Olin Corporation.

I have worked in many different roles within Olin since I joined the company in 1977, and have been closely involved with transportation policy for much of that time.

Before I begin, let me express our gratitude to you, Sen. Kennedy for your leadership that led to a solution on the unjustified phasing out of DOT authorized TIH tank cars. We would not have been able to achieve the negotiated solution that we did without your effort. Those efforts, including this hearing, will result in more economic shipping and lower costs for small business in Louisiana and across the country.

Olin ship's more than 45,000 rail cars annually, and we have been awarded AAR's Grand Slam safety award for three years in a row. Winning once is exceptional, and three years in a row is just extraordinary, and it reflects Olin's commitment to safety.

The rail industry's Grand Slam award is presented to companies with spotless safety records, meaning zero non-accident releases, and is a significant accomplishment in rail hazmat transportation.

I am also the Chairman of the American Chemistry Council's Board level Committee on Rail Transportation, and the concerns that I will elaborate on today are shared by many similarly situated chemical companies.

Olin is an active participant in the Rail Customer Coalition www.freighrailreform.com, which is made up of about 80 trade associations representing virtually all commodities shipped by rail. While our specific problems vary across the customer base, the underlying issues around high and escalating rail rates and poor service are consistent.

Following Olin's transformative acquisition of Dow's chlor-alkali assets in 2015, we are the world's largest chlorine company, the world's largest epoxy manufacturer, and a leading ammunition company under the Winchester brand. Our company recently celebrated 100 years on the New York Stock Exchange, and we have over 6,400 employees at 70 locations worldwide.

We also have nearly 700 employees and contractors in the State of Louisiana at our Plaquemine and St. Gabriel sites. Louisiana is a critical state for Olin and we have plans to invest significantly in this great state.

Surely, we are not a small business. However, thousands of small business rely on the timely and economic delivery of chlorine chemistry products to do business. Chlorine ensures that our drinking water is safe, and that restaurants, nursing homes and all types of medical facilities have the sanitizers and disinfectants needed to help prevent the spread of infectious diseases.

The rail challenges we face affect our entire supply chain with all of the costs and service problems ultimately impacting everyone who relies on our products.

You encounter our products every day—whether you know it or not. Chlorine, caustic soda and their derivative products are used for water purification, pharmaceutical and paper manufacturing, durable infrastructure products, and thousands of other industrial processes and applications.

Breweries and food producers rely on hydrochloric acid, a derivative product of chlorine. Methyl Chloroacetate and Choroacetic Acid are used in hair care salons. Metallic Chloride is used in our fireworks every July. There are simply limitless small business applications for these products-- including dental sealants and cements, paints and varnishes of all types, even the wetsuits used in diving, down to the soles of our shoes.

Rail Economic Regulatory Environment

Let me first say that we need rail in order to survive and compete in a global marketplace. Railroads are critically important to our business, and we need the industry to continue to be economically viable.

Unfortunately, for shippers like Olin that have access to only one railroad, what we encounter is a monopoly service provider that exerts market power because of overly permissive laws and regulations.

The rail industry was on its heels in the 1970's, and Congress created a very loose legislative scheme that allowed the rails to return to health in the 1980's-- called the Staggers Rail Act. Since then, the rail industry consolidated from more than two dozen Class I railroads in 1980 to only four major railroads today.

The Interstate Commerce Commission, and later the Surface Transportation Board (STB), effectively nullified the protections Congress included in the Staggers

Rail Act through poor regulatory implementation. Congress sent the STB a message to get more aggressive in 2015 with the passage of STB reform legislation, but we have made little progress since, as we have been awaiting Senate confirmation for STB Board Members for almost three years.

Rail to rail competition in this industry is rare, and unless your facility is blessed by geography, the results are entirely predictable. About two-thirds to three-quarters of chemical facilities are captive to a single railroad, and all of Olin's sites are captive.

Rail rates across the industry continue to spiral up, more than tripling the rate of inflation according to ACC data, and our service levels have been in a near continuous decline with periodic catastrophic service emergencies. Unfortunately, we have virtually no recourse under current law because the checks Congress put in place are simply not functional.

Olin is one of the few chemical companies to bring a rate case before the STB. We spent many millions of dollars on lawyers and consultants to construct a hypothetical railroad, which is necessary to bring a case under STB procedures. Shippers are required to litigate issues such as how many bathrooms a hypothetical railroad company needs, and how often the grass needs to be cut. To say this process is a disincentive for companies to avail themselves of STB processes is an understatement.

At the end of this arduous process, my interpretation of the decision from the STB was that they do not have a process whereby a chemical shipper could ever win a rate case.

This is the key quote from the current Chairman Ann Begeman from our decision, and her conclusion was echoed by other Board Members:

> "While I had been skeptical about the Stand Alone Cost (SAC) test prior to my service at the Board, my concerns have only grown as I have seen the SAC process in action."
>
> "The Board has a duty to ensure that shippers have a viable means to challenge a rate... *Now, the Board should ask whether the SAC process can provide a meaningful gauge of rate reasonableness for carload traffic shippers.* I stand ready to work with my colleagues and Board stakeholders to improve our rate processes."

John McIntosh
Executive Vice President
Olin Corporation

Until the STB makes serious reforms to their processes, we have no real recourse—which of course creates a further imbalance in the relationship between railroads and their customers.

Unlike the rail sector, the chemical industry is fiercely competitive, and rail rates and service have a significant impact on our ability to compete globally as an industry.

Olin and our chemical company peers are focused on retaining our existing customers, and competing for new customers-- by providing the lowest price and highest quality products possible. We invest appropriate levels of capital anticipating market demand, we innovate, and we compete fiercely with our peers. My experience with the railroad industry is that they extract the highest possible rate from customers that have no alternative, while providing the minimal level of service to those customers. This is not a free or competitive market.

The STB has been understaffed for years and unable or unwilling to move forward with necessary reforms. We appreciate the attention Sen. Kennedy is giving to these critical issues, and ask for your continued engagement to help push the STB to move forward with reforms.

Rail Service

To make matters worse, in recent years we have also experienced additional cuts in service and investment in the rail network. This trend took hold when activist investors installed Hunter Harrison as CEO of CSX railroad, and we have seen this movement spread across the entire rail industry. These cuts and resulting service breakdowns have had serious business consequences for Olin and many of our peers and small business customers.

During the worst of the CSX service crisis, we experienced lost railcars that were carrying toxic by inhalation material, we observed rail cars "ping ponging" across the network via our GPS devices that we have installed on our cars, and we spent countless hours trying to communicate these problems to CSX, which was virtually completely unresponsive.

Imagine your frustration calling your cable provider with a problem, and amplify that by 1000x and you can begin to understand our level of frustration. I'll acknowledge that the situation with CSX has improved with another change in management, but this episode caused tremendous damage throughout the economy, and CSX faced virtually no consequences.

Given the lack of consequences, most of the other railroads are moving forward to implement new operations strategies modeled after CSX. We fear this will lead to stripping out employees and reducing investment in the network in order to drive down operating ratios. We also fear that the slightest strain on a network this thinly resourced will lead to many more service problems in the future.

Operating ratios reflect the businesses' operating expenses as a percentage of revenue, and are common in capital-intensive industries like rail. A low operating ratio indicates high profitability, i.e. increasing revenue and decreasing expenses and investments. We are seeing operating ratios in the rail sector fall below 60%, which is an astonishing level of profitability. Rail operating ratios were in the 70%'s and 80%'s just a few years ago. This appears to be an indication of reduced investment in the network and increased pricing, and provides further evidence of our observation of reduced service at higher rates.

The primary beneficiaries of this practice are investors—not the customers that rely on the railroads to do business. Nobody is saying profitability is a bad thing; to the contrary, we want railroads to be prosperous and invest in their network and service. But you can't consider these radically lower operating ratios without also considering that railroads are essentially a utility industry with an insurmountable barrier to entry, and one that is allowed to have total market power over the customers that need them in many places. It is just another piece of evidence that this industry deserves a closer examination from Congress and the STB.

Service problems are not merely inconvenient—they cause serious disruption to our customers and to our ability to operate. Chlorine plants run 24/7 and we carefully balance our production and our ability to move product offsite.

Likewise, a customer that does not receive their shipment may be forced to shut down, and we have many customers that experienced severe disruptions during the CSX crisis. In some cases not involving chlorine, we were able to provide trucking service at great expense, but for chlorine shipments this is simply not an option. Impacts to small businesses from these disruptions can be devastating.

I'll offer two representative examples to consider. We have a small business customer in Williamsport, PA that is currently losing $100,000 a day due to no chlorine being delivered despite on time orders and on time shipments by Olin. These are lost sales to a small company that is struggling financially. We've also seen a railcar take 40 days to travel from Charleston, TN to New York, with several days of no movement at all. This customer was forced to put their facility in shutdown status as a result.

I believe the STB should look at establishing minimum service requirements as a part of the railroads' common carrier obligation.

AAR Tank Car Committee Problems

I want to discuss two more technical issues where we could use the Committee's assistance and engagement.

1) Tank Car Committee

As a large shipper of tank cars, Olin is deeply vested in policies that impact our ability to maintain a safe and cost effective fleet. Olin owns or leases our entire fleet of tank cars, and while Congress has given sole rulemaking authority to the Department of Transportation (DOT) to establish tank car standards, our experience is that the railroad industry-controlled Tank Car Committee (TCC) has assumed inappropriate control over this function.

The TCC is organized under the control of the Association of American Railroads (AAR), who controls a majority of votes on the Committee. The TCC has asserted that it has authority to prohibit the use of tank cars that meet all applicable DOT requirements, requiring owners to replace these cars long before the end of their useful service life, imposing hundreds of millions of dollars in unwarranted burdens on U.S. manufacturers.

AAR is functioning as the regulator in this space without the requirements typical for a normal rulemaking-- such as cost benefit analysis, safety reviews and public comment. The result is the rail industry exerts their will without the appropriate level of government scrutiny, at the expense of their customers. Olin and other rail shippers make significant long-term capital investments in tank cars, and need confirmation that DOT and not the railroads will be the ultimate authority on what cars we can and cannot use.

I would ask the Committee's assistance in requesting that DOT grant the rail shippers' petition, filed more than two years ago, to initiate a rulemaking that would allow for an open and transparent discussion on TCC reform. I would also ask you to consider introducing legislation that would clarify to DOT that they have the responsibility to set tank car standards for the United States, not a self-interested industry group.

2) Appendix B

Unfortunately, the TCC is also imposing new requirements that inappropriately expand the scope of regulation for routine functions performed at rail shipper facilities. The TCC recently updated its standards for the Certification of Tank Car Facilities – otherwise known as "Appendix B" – in response to unpublished DOT regulatory interpretations that have not been appropriately considered through the rulemaking process.

In documents presented at a public meeting of the Tank Car Committee, the Federal Railroad Administration has taken the position that the replacement of virtually any tank car component is a maintenance function and therefore must be performed only by a certified tank car facility. This interpretation will require facility certification for operations normally conducted at a shipper's loading facility, including the replacement of plugs, caps, or even a manway bolt. This position is inconsistent with DOT's longstanding acknowledgement that both inspection and replacement of parts may be part of a shipper's pre-trip examination of a tank car.

If carried forward, these new and unwarranted "interpretations" will impose significant new regulatory burdens, forcing us to send tank cars to a certified repair shop more frequently. This will take cars out of service for months at a time and further reduce the productivity of our rail car fleet.

Consistent with the Administration's regulatory reform agenda, DOT/FRA should issue an interpretation that minimizes regulatory burdens without compromising the Department's highest priority of safety.

Conclusion

Sen. Kennedy, again, thank you for holding this hearing today. You have been a great ally and representative for rail shippers and our small business customers that experience a myriad of challenges with the rail sector. We look forward to continuing to work with you and your staff to find solutions that will improve this situation for rail shippers—and solutions that will ultimately help the economy and the rail industry itself.

Senator KENNEDY. Thank you, John.

Alright, Ms. Lyra Gulfo. I said that right, yes?

Ms. GULFO. That's right.

Senator KENNEDY. Lyra is our next panelist. She is the Rail Category Manager with Solvay America. Is that right?

Ms. Gulfo is responsible for rail freight and rail car leasing for Solvay business units in the United States, Canada and Mexico.

She's been in the chemical industry since 1998. She's previously held supply chain and logistics management positions in a variety of industry sectors and across different modes of transportation.

Ms. Gulfo is based in Houston where Lyra is a member of the Greater Houston Partnership Women Business Alliance. She recently joined the National Industrial Transportation League Board as a member of the rail transportation committee.

Ms. Gulfo earned her Bachelor's Degree in industrial engineering from, help me with this.

Ms. GULFO. Universidad del Norte.

Senator KENNEDY. That's right.

[Laughter.]

In Columbia.

She is very experienced and very knowledgeable about the issues that face our railroads and their shippers and the challenges for small business people.

I'm looking forward to hearing her testimony and I thank her for being here.

And I was in Colombia about eight months ago. It is a beautiful country.

STATEMENT OF LYRA GULFO, RAIL CATEGORY MANAGER, RAIL LOGISTICS, SOLVAY AMERICA, INC., HOUSTON, TX

Ms. GULFO. Thank you, Senator.

Thank you, Senator, for inviting me to testify here today.

Like you mentioned, my name is Lyra Gulfo and I am the Rail Category Manager for Solvay.

For those of you who don't know, Solvay is a multi-specialty advanced materials and chemical company. We are committed to developing chemistry that addresses key societal challenges. We partner with our customers to aim the way across multiple diverse global markets.

Currently, our products are using planes, cars, smart and medical devices, batteries, oil and mineral extraction, among many other applications that promote sustainability.

Solvay first operated in the U.S. in the early 1890s and we currently have 6,400 employees across 44 industrial sites, eight Formulation Centers, seven R and I centers, three headquarters in North America, Alpharetta, Georgia; Houston, Texas; Princeton, New Jersey. And here in Louisiana our footprint includes a site in Baton Rouge and a site in Shreveport. We have 22 union sites and are a net exporter of the U.S.

Our site in Shreveport is currently investing a million dollars in it's rail infrastructure which is why we believe that rail transportation, it's a critical component to the U.S. development.

However, the current regulatory environment stifles growth by reducing access to transportation, non-competitive pricing and regulatory rules that are too taxing on the chemical industry.

Like how was mentioned, I would like to offer a couple of examples on how the current environment has impacted businesses like mine.

Solvay used to have a site in Martinsville, Pennsylvania, that consumes about 40 million pounds of ethylene oxide, a TIH, over the rail with increased regulatory burdens on rail transportation and the ever-increasing rail rates, the site became non-competitive and closed up two years ago.

Unfortunately, shippers don't have a viable option like John mentioned to challenge these rates. Current rate cases take an average three and a half years and over five million dollars to complete which is not feasible for small- and medium-sized enterprises.

Even the STB has acknowledged that the current rate review process is broken which is why we are calling on Congress to continue to press STB for meaningful reform for this process today.

Congress should continue to provide this oversight of this issue even after the task force has completed.

On the service issue I would like to share some of our instances that we also suffer from in the south. We have a couple of customers whose home is—Georgia where they're captive to one Class One railroad. As a result, they don't have access to competition. During many changes that took place earlier this year, transit times doubled—increased and switchings were missed. And as a result of that one of our customers was faced with a stuck car situation impacting the production lines on two separate occasions.

Interestingly, there is an interchange station which is open to two Class One railroads, five miles away from this location. With competitive switching Solvay estimates that we could have not only saved our customers competitively, but we could have also provided better service and delivery performance to them.

Unfortunately, these examples are too common and we are very grateful that Congress has taken an important step to pass regulation on how the STB operates and now STB is making much needed changes to adopt free market principles and do a better job resolving these longstanding rail freight problems.

We believe that Congress should continue to encourage the Board to support common-sense reforms such as competitive switching and alternative review methodology.

The STB is currently considering a proposal that provides practical blueprinting for competitive switching. This proposal would allow a rail freight shipper to move their freight to another major railroad when access is reasonably accessible.

Alternative Rate Review Methodology is becoming a top priority for the Board as current STB Chairman Ann Begeman mentioned. One approach, competitive rate benchmarking, offers a market-based alternative for STB to review so rail shippers that like access to competitive transportation options could compare their rates to benchmarks of that of competitive rail traffic.

I am pleased that the Committee took the time today to focus on how Congress can help small businesses benefit from these smart regulations and I thank you for the opportunity for speaking to you today.

[The prepared statement of Ms. Gulfo follows:]

SOLVAY
asking more from chemistry®

Testimony of

Lyra Gulfo
Rail Category Manager

On Behalf of
Solvay America Inc.

Before the
United States Senate
Committee on Small Business & Entrepreneurship

Field Hearing on
"How Small Businesses Benefit from Smart Shipping Regulation"

November 16, 2018

Senator Kennedy, and members of the Committee, thank you for inviting me to testify today. My name is Lyra Gulfo. I am the Rail Category Manager for Transportation at Solvay America, Inc. and we are a member and immediate past chair of the National Industrial Transportation League (NITL) Rail Transportation Committee. I have worked in logistics and supply chain for 20 years.

Solvay is a multi-specialty advanced materials and chemical company, committed to developing chemistry that addresses key societal challenges. We were started by 2 entrepreneurs in 1863 and first operated in the U.S. in the early 1890's. Solvay innovates and partners with customers in diverse global end markets. Its products and solutions are used in planes, cars, smart and medical devices, batteries, in mineral and oil extraction, among many other applications promoting sustainability. Its lightweighting materials enhance cleaner mobility, its formulations optimize the use of resources and its performance chemicals improve air and water quality. In the United States, Solvay employs 6,400 people in over 44 major industrial sites, eight Formulation Centers, seven Research and Innovation Centers (R&I) and three North American headquarters in Alpharetta, Georgia; Houston, Texas; and Princeton, New Jersey. We have 22 union sites and are a net exporter in the U.S. Here in Louisiana our footprint includes two facilities; one in Shreveport and one in Baton Rouge with a total of 144 employees.

For many years, the U.S. chemicals industry was challenged by high cost inputs. The availability of, and inexpensive price for, U.S. shale gas since 2010, has created a renaissance for the U.S. chemical industry. In fact, the U.S. is currently the most attractive place in the world to invest in chemical manufacturing, transforming the U.S. economy into a stronger growth market and new jobs. To put some numbers to this - 333 chemical industry projects cumulatively valued at $202.4 billion have been announced, with 53% of the investment completed/under construction, and 41% in the planning phase. Fully 68% of the total is direct foreign investment or includes a foreign partner, the American Chemistry Council (ACC) reported. Project types include new facilities and capacity expansions, which are long-term investments that we seek in the U.S. ACC analysis shows $202.4 billion in capital spending could lead to $292 billion annually in new chemical and plastics industry output and support 786,000 jobs across the economy by 2025.

While this is a very positive story, companies such as Solvay face increasingly high rail transport costs. Rail transportation is a critical component of U.S. industrial competitiveness. However, the current regulatory environment stifles this growth by reducing access to transport, non-competitive pricing, and technical rules that disproportionately affect the chemical industry.

For small and medium sized enterprises, this has direct impacts. High transport costs and inconsistent availability of raw materials due to lack of capacity in the American rail network make it very hard to manage supply chains and product costs. Since chemicals serve as key components to consumer products including electronics, home cleaning products, personal care and automobiles, the impacts of these challenges trickle through the U.S. economy and are ultimately felt in our wallets.

That is why I believe smart shipping regulation is needed to enable the continued growth of this dynamic and sustainable industry.

Massive consolidation within the rail industry has left just four railroads in control of 90 percent of the rail traffic in the U.S. As a result, freight rail rates have doubled – more than three times the rate of inflation over the past decade —even though the volume of freight carried by the railroads has barely increased. Shippers currently do not have a viable option for challenging these rates. Currently, rate cases take an average of three and half years and cost more than $5 million to complete. That is not viable for small and medium sized enterprises. Even the STB has acknowledged that the Board's rate review process is broken and has established a Rate Review Task Force to address this important issue by streamlining and improving the rate review methodology for large and small rate cases. Congress should continue to provide oversight of this issue and press the STB to make meaningful reforms after the Task Force has concluded.

Congress took an important step by passing legislation to help improve how the STB operates, and now the STB is pursuing much needed changes to adopt free market principles and do a better job resolving long-standing freight rail problems. Congress must prioritize confirmation of the three pending STB nominees and encourage the Board to keep moving forward on these common sense reforms that will get freight rail polices back on track and back to work for the entire U.S. economy.

Shippers further face bureaucratic barriers in the form of the reliance on the American Association of Railroads (AAR) Tank Car Committee (TCC) in technical rulemaking in which railroads have a disproportionate impact on regulatory development to the exclusion of the shippers that have to ultimately implement these directives.

We would urge your Committee's leadership in quickly addressing the following areas of concern:

Press STB for modernized regulatory frameworks that emphasize competition: Federal regulations shield railroads from competing with each other and from transparent pricing mechanisms. Many shippers are left with no effective competition for rail service and no meaningful process to challenge unreasonable rail rates.

As part of the Staggers Rail Act, Congress envisioned a process that would allow shippers served by a single railroad to have their cargo switched to another nearby carrier as a way to promote rail competition. But due to antiquated rules adopted by the STB, no shipper has been able to successfully request the transfer of their cargo from one railroad to another. When shippers lack access to rail competition, there must be a meaningful path to challenge unreasonable rates. However, under the STB's Stand-Alone-Cost (SAC) standard, to successfully challenge a rate, a shipper must design, on paper, an entire railroad business, and prove that it could serve the same traffic at a lower cost than the rates charged by the existing railroad. This process is widely recognized as too complex, too costly, and too time consuming.

Congress should press for two specific regulatory updates that would address these underlying non-competitive approaches:

1. **Competitive switching:** The STB is considering a proposal that provides a practical blueprint for competitive switching. The proposal would simply allow certain rail customers to request that their freight be moved to another major railroad only if another rail line is reasonably accessible. If the switch is shown to be unsafe or harmful to other customers, the railroad can block it. And there is no "free lunch" for the shipper—they would have to pay an appropriate "access" fee to cover the railroad's costs.

2. **Alternative Rate Review Methodologies:** STB Chairman Ann Begeman has stated that finding an alternative to the SAC process must be a top Board priority. One approach, competitive rate benchmarking, offers a market-based alternative for STB rate reviews. This would bring more transparency and likely reasonable costs to captive shippers.

Mandate that DOT establish rulemakings through transparent and public process: The AAR's Tank Car Committee (TCC), which is comprised of railroads, tank car builders, and tank car owners/shippers, oversees the industry standards for those assets. The rail shippers who own or lease these transportation assets comprise only a small portion of the TCC's voting members while railroad members of the TCC constitute a voting majority. This has given the rail industry a disproportionate voice and influence regarding issues impacting all stakeholders. More than two years ago, a group of trade associations representing rail shippers petitioned the Pipeline and Hazardous Materials Safety Administration (PHMSA) to initiate a rulemaking to more clearly define the role of TCC in development of tank car standards. This petition remains pending before DOT.

The Department of Transportation continually cedes delegation of authority to the rail industry, via the TCC, giving the industry a central role in the implementation of rail tank car standards and regulations. This regulatory authority comes without the requirements of federal rulemaking procedures such as cost benefit analysis, safety reviews, public comment, etc. Because of the lack of due process, the voting majority of the rail industry is able to push through their desired outcome, many times to the detriment of the tank car owners and builders who bear the consequences of those outcomes. As a result, the TCC can unilaterally prohibit the use of tank cars that meet all applicable DOT requirements, requiring owners to replace tank cars long before the end of their useful service life and imposing hundreds of millions of dollars in unwarranted burdens on U.S. manufacturers.

DOT must clarify that the TCC's delegated authority does not include the power to impose new requirements unilaterally while disregarding stakeholder input and dismissing DOT authority. DOT should grant the rail shippers' petition to initiate a rulemaking that would allow for an open and transparent discussion on TCC reform. We are strongly committed to safety and believe that a more transparent approach will create an environment that develops both safe and economic regulatory frameworks for our industry.

As the Agency with sole authority to impose tank car requirements, DOT must also finalize pending rules related to cars used to transport toxic-inhalation-hazard (TIH) materials. The Association of American Railroads, the American Chemistry Council, the Chlorine Institute, and the Fertilizer Institute have jointly asked DOT to establish a phase-out date of December 31, 2027 for tank cars not meeting PHMSA's HM-246 specification for the transportation of TIH materials. All stakeholders agree that the HM-246 design provides the most feasible means to achieve increased safety and accident survivability.

It is important to all parties for DOT to establish an appropriate phase out deadline through federal regulation. A timely final DOT rule will give car owners and lessees the regulatory certainty needed to facilitate long-term capital planning. Compared to the July 2023 phase out deadline previously established unilaterally through AAR's interchange standards, the 2027 deadline reduces the cost to shippers and tank car owners by $92 million to $133 million. DOT should also move forward as quickly as possible to finalize related rules to designate the HM-246 specifications as a "final" standard for TIH tank cars. This would bolster fleet modernization and provide continued safety improvement in hazardous materials transportation.

I am pleased the committee has been able to take the time focus on small businesses benefitting from smart regulations. Thank you for the opportunity to speak to you today and I welcome any questions you may have.

Senator KENNEDY. Thank you. Thank you, Lyra, very, very much.

Let's see. Who is next here? Ailsa.

Ms. DOBENECK. That's right.

Senator KENNEDY. Ailsa von Dobeneck.

Ms. DOBENECK. Perfect. Okay.

Senator KENNEDY. Alright, alright.

Ailsa is the Director of External Affairs at the New Orleans Public Belt Railroad.

Let's see. She ascended her role with the New Orleans Public Belt Railroad with the transition of the railroad to the Port of New Orleans in February 2018, not that long ago, where she was serving as a Public Affairs Consultant.

As Director of External Affairs, also oversees the Community and Public Relations part, Government Affairs, Corporate Communications.

She's previously served as Government Relations Manager for Norfolk Southern Railway in Washington, DC.

She began her career in Panama City and Singapore where she worked in the maritime industry.

She has a Master's Degree in International Relation from King's College, London, very, very impressive, a Bachelor's Degree in International Relations and a Bachelor's Degree in German from the University of Georgia.

The floor is yours.

STATEMENT OF AILSA von DOBENECK, DIRECTOR OF EXTERNAL AFFAIRS, NEW ORLEANS PUBLIC BELT RAILROAD, NEW ORLEANS, LA

Ms. VON DOBENECK. Don't hold the University of Georgia against me. LSU showed us who was boss the other week, so.

[Laughter.]

Senator KENNEDY. I'm sure it's a great school, great school.

Ms. VON DOBENECK. Thank you very much for the opportunity to speak today. I wanted to welcome everybody to the Port of New Orleans.

As of February of this year, the New Orleans Public Belt transition from the City of New Orleans to the Port of New Orleans. So, now we're one big happy family and the synergy really provides unparalleled opportunities for growth for New Orleans businesses, Louisiana businesses and beyond. So, thank you for the opportunity for today.

I want to tell you a little bit about the New Orleans Public Belt Railroad. We have been here for over 110 years. We're very unique. By rail car volume, New Orleans is actually the Nation's fourth largest rail gateway.

We're a Class Three switching railroad and our primary mission is to serve the Port of New Orleans and local industry.

We're a neutral carrier. We have 26 miles of mainline track and we have direct connections to six Class One Railroads. So, it's quite a robust rail competition in New Orleans.

Our Class One partners have a combined 132,000-mile network of track, which tie the port community and local industries directly to almost every major North American market. These direct connections give shippers in New Orleans and the surrounding areas the benefit of more competitive rates, faster transit times, and distribution to multiple markets.

We work really closely with our Class One partners. Just as an aside, we have quarterly steering committees where all of the Class Ones come together in New Orleans and monthly superintendent meetings where all the Class Ones come together and it could be, we talk about the fluidity of the New Orleans gateway. We talk about joint projects. So, we really work well together and invest a lot in our greater New Orleans network.

I'd like to thank the Committee for its support of the short line rail industry and your understanding of the positive impact we bring to the local community.

Now, one of every four rail cars moving on the national network is handled by a short line. And we provide the first and last mile for a wide variety of goods from energy products, to industrial products, to finished consumer goods.

Our services provide the opportunity for local shippers to have efficient and cost-effective access across the national rail network.

At NOPB we have 175 team members and we work together to ensure freight is moved efficiently and safely across the city every day. We're a 24/7 operation. We live here, work here, and we are 100 percent dedicated to the success of New Orleans businesses and Louisiana businesses at large.

Now, for NOPB, safety is our number one priority. We're an urban rail network so we're, we, kind of, follow the river and we go through the city. The rail industry as a whole has a really impressive safety record, with 99.997 percent of hazmat carloads moved without release caused by an incident, but we're dedicated to becoming even safer.

We've made a lot of significant technological investments and we implemented our own operation standards across the industry.

Our safety record, as an industry, makes us a good choice for moving hazardous materials vital to our everyday lives. In fact, the Federal Government requires railroads to carry hazardous materials under our common carrier obligation. We must accept, move, and handle hazmat cars by law.

We're really pleased that the Association of American Railroads and members of the shipping community have found common ground and agreed upon an appropriate phase-out time period for TIH tank cars, the older ones.

We're really, really encouraged and enthusiastic about this spirit of collaboration and we're confident that the plan will increase rail safety standards while ensuring the commodities reach where they need to go. And we look forward to a potential Notice of Proposed Rulemaking by the DOT.

As I said, we, at NOPB, we're an urban railroad so we've also adopted some special operating practices for hazmat that meet and exceed regulatory standards. These protocols were recently reviewed and they cover all of our trains on the network. So, that includes a low speed restriction, multiple inspections a week and increased education programs with our emergency responders.

We are as dedicated to being safe and reliable neighbors as we are dedicated to being a safe and reliable transportation option.

I encourage everyone this morning. There was an op ed in the Advocate from the Small Business Entrepreneurial Council, their head economist there. He talked about the benefits of the railroads to small business. It was an interesting piece and how government revamp of additional regulations might be hurtful to small businesses. So, I encourage everybody to just take a look at that. That was in the paper today.

So, I just want to thank the Committee for your time and for your dedication to small business and the short line rail industry and the rail industry, in general. And I'm happy to address any questions after the panel, Senator.

[The prepared statement of Ms. Von Dobeneck follows:]

WRITTEN STATEMENT
OF
AILSA VON DOBENECK
DIRECTOR OF EXTERNAL AFFAIRS
NEW ORLEANS PUBLIC BELT RAILROAD CORPORATION
BEFORE THE
COMMITTEE ON SMALL BUSINESS & ENTREPRENEURSHIP
FIELD HEARING
NEW ORLEANS, LOUISIANA
HOW SMALL BUSINESSES BENEFIT FROM SMART RAIL SHIPPING REGULATION
NOVEMBER 16, 2018

Good morning Mr. Chairman, Ranking Member, and Members of the Committee. My name is Ailsa "Elsa" von Dobeneck and I serve as the Director of External Affairs for the New Orleans Public Belt Railroad (NOPB). Thank you for the opportunity to appear today to discuss the benefits of rail to the local, state, and national economies. I would also like to thank you for your leadership and for your efforts to advance rail safety standards, while ensuring competition and growth.

New Orleans Public Belt Railroad has served a vital role in the region's transportation network for over 110 years. By railcar volume, New Orleans is the nation's 4th largest rail Gateway. NOPB is a Class III switching railroad with the primary mission of serving the Port of New Orleans and local industries. We are a neutral carrier, with 26 miles of mainline track and direct connections to six (6) Class I Railroads. Our Class 1 partners have a combined 132,000 plus mile network of track, which tie the port community and local industries directly to every major North American market. These direct connections give shippers in New Orleans and surrounding areas the benefit of more competitive rates, faster transit times, and distribution to multiple markets. In February of this year, NOPB transitioned from City of New Orleans to Port of New Orleans leadership. This synergy provides unparalleled opportunities for growth with a shared vision.

I would also like to thank the committee for its support of the shortline rail industry and your understanding of the positive impact we bring to the local economy. One of every four rail cars moving on the national network is handled by a short line, providing the first and last mile for a wide variety of goods from energy products, to industrial products, to finished consumer goods. Our services provide the opportunity for local shippers to have efficient and cost effective access to the national rail network. At NOPB we are a team of 175 strong, working together to ensure freight is moved efficiently and safely across the city. We live here, work here, and are dedicated to the success of New Orleans businesses.

As NOPB continues to grow, safety remains our number one priority. The rail industry has an impressive safety record, with 99.997% of hazmat carloads moved without a release caused by an incident and we are dedicated to becoming even safer. This impressive record is the result of significant technological investments and implementation of operations standards across the industry. Rail's safety record makes it a good choice for moving the hazardous materials vital to our everyday lives. In fact, the federal government requires railroads to carry hazardous materials under our common carrier obligation. We must accept, move, and handle hazmat cars by law.

It is our understanding that the Association of American Railroads and members of the shipping industry (including the American Chemistry Council, Fertilizer Institute, and Chlorine Trade Association) have found common ground and agreed upon an appropriate phase-out time period for older TIH tank cars. We are enthusiastic about this spirit of collaboration and are confident the plan will increase rail safety standards while ensuring the commodities vital to our everyday lives are accessible. We look forward to a potential Notice of Proposed Rulemaking by the Department of Transportation (DOT) and support balanced and safety-oriented progress.

As NOPB is an urban railroad, we have also adopted special operating practices for hazmat transport that meet and exceed regulatory requirements to help ensure these sensitive commodities are shipped safely and securely. These protocols were recently reviewed and expanded to cover all trains carrying a single carload of certain hazmat or 20 carloads of any combination of hazmat, such as crude oil and ethanol. These protocols include: a low speed restriction across our entire network, inspections multiple times a week, and increased education programs with emergency responders. We are as dedicated to being safe and reliable neighbors, as we are to being a safe and reliable transportation option.

Thank you for your time and for your dedication to small business, shortline rail, and safety. I am happy to address any questions you may have.

Senator KENNEDY. Okay, thank you.

I'm making notes here. I've got a lot of questions. Now, I just remembered we may have some from the audience.

Our next panelist is the Honorable Paul Roberti. Paul is the Chief Counsel, Pipeline and Hazardous Materials Safety Administration with the Department of Transportation.

Our Secretary of the Department of Transportation, the Honorable Elaine Chao, she's the best. She just—there are a lot of capable people in this world, but if I were going to pick one person in the Federal Government to get something done that I really needed to be done, it would be Elaine. She's a very bright, capable person.

Paul was sworn in as Chief Counsel in March of 2018. He was most recently an Executive Director at Ernest and Young as a member of the Advisory Practice. He specialized in Power and Utilities.

Previously, he worked in Rhode Island as a State Public Utilities Commissioner for eight years, as Assistant Attorney General and the Chief of the Attorney General's Regulatory Commission. He was a law clerk for the State Supreme Court and in the Energy Committee, Mr. Roberti has served as Chairman of the Subcommittee on Pipelines at the National Association of Regulatory Utility Commissioners.

He served on the U.S. Department of Energy's Electricity Advisory Committee. He served on the Gas Technology Institute's Public Interest Advisory Committee. He has a degree in Chemistry from the College of the Holy Cross and he has a Juris Doctorate from Suffolk University School of Law.

I thank him for being here, the Honorable Paul Roberti.

STATEMENT OF PAUL ROBERTI, CHIEF COUNSEL, PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, WASHINGTON, DC

Mr. ROBERTI. Well, thank you, Senator Kennedy, and thank you for the opportunity to testify today in the great State of Louisiana about the Pipeline and Hazardous Materials Safety Administration's efforts to advance the safety of rail tank cars transporting hazardous materials.

On behalf of Secretary Chao and Administrator Skip Elliott, I want to thank you for your leadership and personal efforts to improve the safety of the Nation's railroad system.

Safety is the number one priority for Secretary Chao and everyone working within the Department of Transportation.

PHMSA's mission is to protect people and the environment from the risk of hazardous materials by all modes of transportation. We achieve this mission by creating regulations and carrying out a comprehensive safety oversight strategy. We advance education and research and development projects focused on enhancing safety and accident prevention.

PHMSA also provides funding and training to prepare first responders to mitigate hazards in the unlikely event that an incident occurs. Our goal is to reduce risk towards zero deaths, zero injuries, prevent property and environmental damage and avoid transportation disruptions.

Tragic train accidents like Lac-Mégantic in Quebec in 2013; Graniteville, South Carolina, in 2005; Macdona, Texas, in 2004; and Minot, North Dakota, in 2002, underscore the need to improve the safety of rail tank cars. We remain vigilant while working with industry to prevent these types of accidents from ever happening again.

In the interest of time, I refer you to my written testimony which describes first, PHMSA's hazardous materials safety program and its role in preventing and mitigating incidents.

Second, background about PHMSA's regulatory authority and the status of pending rulemakings.

Third, PHMSA's efforts to build consensus within the regulated industry and our work to modernize standards and reduce regulatory burdens on small businesses.

And lastly, PHMSA's efforts to finalize standards for rail tank cars that transport hazardous materials classified as toxic inhalation hazards, such as anhydrous ammonia and chlorine. For this class of hazardous materials, we are coordinating with the Federal Railroad Administration to resolve a number of issues that will promote their safe transportation on the Nation's railroads.

As you know, Senator Kennedy, these products are essential for sustaining our food and water supplies and our health and safety depend upon their safe transportation.

As an example of our collaboration with the Federal Railroad Administration and the industry, PHMSA has accepted a number of petitions for consideration in upcoming rulemakings that address the safe transportation of toxic hazardous materials.

PHMSA appreciates the expertise that both the shippers and the rail carriers contribute to the regulatory process, as well as their commitment to build consensus on safety standards. A great example of consensus was the June 19, 2018, joint submission of comments by both the shippers and the rail carriers advocating for a mutually agreed upon phase-out date of December 31, 2027, for legacy tank cars.

We are pleased that industry reached consensus regarding this proposed date for compliance with the final tank car standard.

Moreover, on September 6, 2018, industry leaders met with PHMSA's leadership in Washington, DC, to reaffirm their support for this newly achieved consensus. They urged PHMSA to accelerate the time frame for completing rules that provide the much-needed regulatory certainty to guide the strategic investment decisions that are necessary to advance safety.

In closing, the success of PHMSA's mission relies on continued collaboration with industry to build on the existing regulatory framework. We need to embrace innovative technologies that provide cost-effective solutions for improving safety, as well as continue to take steps to increase the level of regulatory certainty.

We recognize that both shippers and carriers are important contributors to the success of not only PHMSA's safety programs, but also to our national economy, the State of Louisiana and the Port of New Orleans.

Again, Senator, thank you for the opportunity to testify and I look forward to answering any questions you may have.

[The prepared statement of Mr. Roberti follows:]

WRITTEN STATEMENT OF
PAUL ROBERTI
CHIEF COUNSEL
PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION

BEFORE THE
COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP
UNITED STATES SENATE

HOW SMALL BUSINESSES BENEFIT FROM SMART RAIL SHIPPING REGULATIONS
NEW ORLEANS, LA

November 16, 2018

Senator Kennedy, thank you for the opportunity to testify today on the Pipeline and Hazardous Materials Safety Administration's (PHMSA) efforts to advance the safety of rail tank cars carrying hazardous materials. I would also like to thank you for your leadership in bringing attention to the need to advance the nation's rail safety efforts. As you know, tragic high-profile train accidents involving hazardous materials, such as those that occurred in Lac-Mégantic, Quebec, Canada (2013); Graniteville, South Carolina (2005); and Minot, North Dakota (2002), underscore how important it is to be ever vigilant in protecting local communities and the environment as it relates to the safety of our nation's railroad system. The U.S. Department of Transportation (DOT) and PHMSA work thoroughly to bolster compliance with federal hazardous materials laws and regulations to minimize accidents and impacts to people, communities, and the environment.

Safety is the number one priority for U.S. Secretary of Transportation Elaine L. Chao, PHMSA Administrator "Skip" Elliott and our modal partners across the Department. In particular, PHMSA's mission is to work to protect the American people and the environment from the risks of hazardous materials transportation by all modes, including rail, highway, waterways, air, and pipeline.

PHMSA achieves its safety mission by establishing a national policy of setting forth standards and a comprehensive enforcement regime. PHMSA also advances education, as well as research and development efforts, all with aim to prevent incidents and enhance safety. Additionally, PHMSA provides funding and training to prepare first responders to reduce consequences in the event that an incident does occur. PHMSA's ultimate goal is to pursue all avenues to reduce risk toward zero deaths, zero injuries, and to minimize environmental and property damage, and transportation disruptions.

This testimony will provide a summary of PHMSA's hazardous materials safety program and its role in advancing rail safety. It will also discuss ways in which PHMSA is attempting to modernize standards and reduce regulatory burdens on small businesses. And finally, it will provide an update on PHMSA's efforts to finalize standards for rail cars that carry hazardous materials with toxic inhalation hazards and share with you how PHMSA is working to build consensus among stakeholders in the regulated industry.

I. STATUTORY AUTHORITY AND PHMSA'S RESPONSIBILITIES IN DEVELOPING HAZARDOUS MATERIALS REGULATIONS

Federal hazardous materials transportation law authorizes the Secretary of Transportation to "prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce." The Secretary has delegated this authority to PHMSA, which is responsible for administering a safety and enforcement program that minimizes the inherent transportation risks to life, property, and the environment inherent in transportation in commerce. Each year, the collective efforts of PHMSA and other DOT modal administrations facilitate the safe and secure transit of more than 2.5 billion tons of hazardous materials, valued at more than $2 trillion.

II. COMPREHENSIVE APPROACH TO PREVENT AND MITIGATE RAIL HAZARDOUS MATERIALS ACCIDENTS AND INCIDENTS

Regulations governing the transport of hazardous materials include operational requirements that are applicable to each mode of transportation. To achieve safety, PHMSA sets standards to ensure that hazardous materials are properly classified, appropriately packaged or safely contained in vessels, such as rail tank cars, and finally, that the risks are properly communicated to transportation workers and emergency responders through markings, labels, placards, and shipping documents. This approach is designed to prevent hazardous materials releases in the course of rail transportation, and to mitigate damages in the unlikely event of a release. With specific regard to rail safety, PHMSA and the Federal Railroad Administration (FRA) take a system-wide, comprehensive approach for addressing the risks posed by the bulk transport of hazardous materials by rail. This includes working closely together when considering regulatory changes.

III. PHMSA CONSIDERS IMPACTS ON BUSINESSES WHEN DETERMINING REGULATIONS

When considering rules and regulations, PHMSA carefully weighs safety benefits against the economic impact to businesses and consumers. PHMSA discharges its responsibilities in accordance with principles of good government by embracing a regulatory philosophy that promotes transparency, stakeholder engagement, and regulatory restraint. The Department's Regulatory Reform Task Force plays a significant role in helping PHMSA to assess the efficacy of existing regulations, guided by three principles: (1) to reduce the regulatory burden on the public without compromising safety; (2) to streamline permitting; and lastly (3) to enable innovation.

Consistent with existing law and the Administration's priorities, the agency seeks to tailor its regulations to impose the least burden on society while achieving its regulatory objectives. PHMSA's economic assessments follow the best practices as outlined by the Office of

Management and Budget. Each regulation is also accompanied by a regulatory flexibility assessment, which considers the rule's impact on small businesses and explores ways regulatory burdens could be reduced, as required by the Regulatory Flexibility Act. PHMSA provides the American public, including small businesses, the opportunity to review and comment on rules through notice-and-comment procedures, and works closely with the Small Business Administration's Office of Advocacy to address disproportionate impacts on small entities in an effort to reduce their regulatory burden. Additionally, PHMSA's Hazardous Materials Safety Assistance Team (HMSAT) conducts face-to-face outreach throughout the country to ensure accessibility and transparency to small businesses and other stakeholders.

IV. CURRENT EFFORTS TO FINALIZE STANDARDS ON TIH

PHMSA works closely with multiple DOT operating administrations to ensure consistency in administering hazardous materials transportation safety programs across all modes. We are currently actively working with our counterparts at FRA to address many issues relevant to the safe transportation of hazmat by rail, including the transportation of materials that pose a toxic inhalation hazard (TIH). These TIH materials, which include essential products, such as anhydrous ammonia and chlorine, are vital not only to our nation's infrastructure, but also to our health and safety since our water and food supplies depend on their safe movement. PHMSA recognizes its critical role as an agency that must ensure the safety of a vast transportation network that supports our economy and our national way of life.

As an example of our close collaboration with FRA and our industry stakeholders, PHMSA has reviewed, analyzed, and accepted several petitions for consideration in upcoming rulemakings that address the safe transportation of materials that are toxic when inhaled. These petitions cover a range of issues, including: finalizing specifications codified in 2009 to provide certainty to industry regarding tank car design and construction standards; extending the authorized service life for tank cars that meet improved standards from 20 to 50 years; and determining an appropriate timeline for phasing out rail tank cars that do not meet the final standard. PHMSA appreciates the wealth of expertise that the shippers and carriers provide to the regulatory process, as well as their continued commitment to build consensus on necessary safety standards.

We are pleased to note that the Association of American Railroads (AAR) and several associations representing TIH shippers, including the American Chemistry Council (ACC), the Chlorine Institute (CI), and the Fertilizer Institute (TFI), have reached a general consensus with respect to one of the more challenging determinations proposing to develop a timeline for compliance with the final TIH tank car standard. On June 19, 2018, AAR, ACC, CI, and TFI, submitted joint comments to PHMSA advocating for a mutually agreed-upon phase out date of December 31, 2027. On September 6, 2018, leadership of each of these organizations came together to meet with PHMSA's senior leadership team to affirm their support for this new approach. These organizations jointly urged PHMSA to accelerate the timeframe for completing rules to provide certainty for the strategic investment decisions that stakeholders must make to advance safety. This collaborative effort by our industry partners has greatly facilitated our efforts to finalize a draft rule that can be issued for public notice and comment and finalized as expeditiously as possible.

Looking ahead, we know that additional challenges remain as we work together with all stakeholders to build on our existing safety framework. In addition, we must work together to facilitate the adoption of innovative technologies and solutions to advance safe transportation for the benefit of the public. We remain confident that our shared goals of safely delivering vital commodities throughout our nation will help overcome these challenges and we look forward to working with all concerned.

V. CLOSING REMARKS

In closing, DOT and PHMSA are committed to improving the safety of the transportation of hazardous materials across all modes. It is important that DOT provide certainty to the regulated community to facilitate the transportation of hazardous materials, which are vital to our national economy and to the local economies of the State of Louisiana and the Port of New Orleans. Furthermore, hazardous materials shippers and carriers are integral partners for improving transportation safety and their collaboration with PHMSA is essential if we are to meet our shared goal of zero incidents. With strong commitment, leadership, and robust stakeholder collaboration, we can ultimately achieve this goal.

We look forward to continuing to work with Congress to strengthen hazardous materials rail safety policy. Together, we can protect America's people and its environment by advancing the safe transportation of hazardous materials. The hardworking staff of PHMSA is dedicated and committed to fulfilling our safety responsibility to the American people. Thank you again for the opportunity to testify today. I would be pleased to answer any questions you may have.

Senator KENNEDY. Thank you, Paul and thanks to all of you.

I have a number of questions. Anybody is welcome to jump in, including our audience.

I want to start with what to me is the most immediate issue. We do have consensus on legacy tank cars. I'm pleased that everybody could come together and agree on a phase-out date. We're in the middle of rulemaking.

Paul, if you could bring us up to date on where the rulemaking is and tell me when it's going to be completed and done.

Mr. ROBERTI. Okay, thank you. Thank you, Senator, for that question.

Senator KENNEDY. I'm kind of result oriented and I know you've got to go through the proper procedure, but tell me when we can take it to the bank.

Mr. ROBERTI. So, as you know, we have a number of petitions before us. I call them the three legs of the stool.

The first is the HM246 compliant tank cars and the extension of the service life of 20 years to 50 years.

I'm pleased to report, Senator, that that rule was published at the Federal Register just last week, early last week.

Senator KENNEDY. Good.

Mr. ROBERTI. So, that is complete and we have some certainty on that front.

The second is the phase out of the legacy tank cars and we're well aware that industry came together and has proposed, reached consensus on the phase-out date of 2027 for the legacy cars.

That one and also including the question of the interim standard that we promulgated in 2009 becoming a final standard where we would take the interim tank car standard and make that the final tank car standard, those two items are pending. They're in notice and public comment.

We intend, we're working as expeditiously as possible to release that rule. It still has to go to OMB. I can't give you a date certain, but I can tell you we are working steadfastly and I can also tell you that your leadership coupled with the consensus that the industry has achieved here will go to great lengths to facilitate our rulemaking process.

We know this rule is important. We know it's necessary to bring regulatory certainty and I'm hopeful that we will have that rule completed as soon as possible, acknowledging that we have to comply with the Administrative Procedures Act, OMB requirements and conduct a robust cost-benefit analysis and have transparency in the process so that everyone can submit their comments.

But the data and the robust cost-benefit analysis that the industry participants have brought to us is very, very helpful in that process.

Senator KENNEDY. Well, thank you for that, Paul.

This is a rule that's going to help. It's going to save a lot of money.

What is it, Marcie, 130 something million bucks?

It was put together with collaboration of everybody, including but not limited to the rail carriers and the shippers. And it's important.

And thank the Secretary for her cooperation through all on this.

My—I probably know, I know that I know less about this subject than anybody on this panel but as I've studied it, this subject in general, I think everybody can agree that the two primary issues, first and foremost, public safety. And I'm not just talking about the legacy car rule.

I'm talking about the larger issues.

First is public safety.

Second is cost, cost for the railroads, cost for the shippers, cost for the large businesses and cost for the small businesses.

I want to start, I want somebody to help me understand the relationship between the Tank Car Committee and PHMSA. Is that how you refer to it?

Mr. ROBERTI. Yeah.

Senator KENNEDY. What is the Tank Car Committee?

My understanding, I've read about it, but my understanding is that it is comprised of both rail carriers and shippers and people who make the cars. I believe I read that it has been around longer or at least its parent company, it's a private sector, it's in the private sector, longer than the Department of Transportation.

Who can educate me on that? And more specifically, what is the relationship between the Tank Car Committee, the private sector group and the Federal Government?

Anybody?

Mr. ROBERTI. I'm glad to——

Senator KENNEDY. Jump in.

Mr. ROBERTI. To lead it off.

So, the Tank Car Committee has been around for decades.

Senator KENNEDY. Yeah.

Mr. ROBERTI. And we consider the Tank Car Committee to be a standard setting of organization.

Regulations, though, safety regulations are made by the Department of Transportation.

So, the Tank Car Committee functions as, really, an organization that covers a wide cross section of the industry, meaning the carriers and shippers and they consider and adopt technical consensus standards and they're valuable to DOT as input into the rulemaking process.

Over the course of decades, both the Federal Railroad Administration and PHMSA have participated. We attend all the Tank Car Committee meetings. We maintain close oversight over those committee meetings and their discussions.

That's not to say, for the most part, it's been a very successful approach to bringing consensus.

These are the practitioners who really understand the industry. And for an agency like DOT that's setting safety regulations, this input is invaluable.

It's not to say that over the course of time that there aren't, every so often, challenging issues that need to be addressed. Where there are, we applaud, just like your leadership, we applaud consensus. It goes a great distance in facilitating the rulemaking process.

But where consensus cannot be achieved, every stakeholder before the TCC reserves the right to file petitions with DOT and ultimately, DOT will step in and DOT will be the final decision maker, on the setting of safety standards that regulate this industry.

Senator KENNEDY. Is there a rule that defines the relationship between the Tank Car Committee and DOT?

Mr. ROBERTI. There is no set rule. There's no set rule. Remember that the DOT sets minimum standards.

So, there's a lot of things that industry is very dynamic.

Ailsa, you commented about adopting some standards that go above the minimum safety standards. That's good.

As each carrier and discussions before in the railroad industry and the shippers find solutions that may advance safety in a cost-effective manner where there's consensus. We want to see that happen.

So, if we look at the TCC as an opportunity to vet those issues, vet the technical considerations and ultimately advance safety.

If there's an economic issue, that belongs to the STB, in my mind. And I appreciate the discussion about the STB.

Senator KENNEDY. We're going to get to that.

Mr. ROBERTI. But if it's a matter of what should be the specification for a tank car, that input can come to DOT but it is DOT and DOT alone that sets the safety standards governing this industry.

Mr. MCINTOSH. Senator?

Senator KENNEDY. Yes, certainly, join in.

Mr. MCINTOSH. Following along those lines in follow up to——

Senator KENNEDY. You might want to get closer to that.

Mr. MCINTOSH. The industry, the chemical industry, as others, has something similar to the Tank Car Committee. We have organizations that are technically focused, standards focused, performance focused, you know. An example for us is the Chlorine Institute which does some of those same activities the Tank Car Committee does.

There are some differences though that the Chlorine Institute doesn't have the authority to set a standard that everybody that belongs to or subscribes to the business of chlorine has to follow. And that's one of the differences.

The Tank Car Committee, in the issue that has been resolved that has been mentioned many times, set a standard for which there was not a consensus at the Tank Car Committee level. We understand that ultimately DOT, if somebody aggrieved in that process, we would have the right to appeal to DOT.

And I guess part of our issue is that we would like the authority the DOT has to really be practiced by them. We would like the same level of requirement for transparency and cost benefit, to be a part of anything that the Tank Car Committee looks at and the obligation to have some kind of a consensus of view point which is really the only way to make progress when you have that many stakeholders represented is important to us as well.

Senator KENNEDY. Well, here's what's confusing me.

I mean, it's clear that the Tank Car Committee has influence and that's a good thing because the Tank Car Committee is in the private sector and government, DOT, is trying to regulate the private sector and you ought to know something about what you're regulating. And the people who know the most about it would be the people involved in it.

Who determines the member? If you have the Tank Car Committee that is extraordinarily influential, not dispositive, but influential, who determines the makeup of the Tank Car Committee?

Anybody?

Mr. ROBERTI. Well, my understanding is that the Association of American Railroads and their various committees have a charter and it sets forth the composition for the committee, certainly aware that the majority is with the railroads.

But I think we need to recognize that the composition is important, that bringing the technical experts from across all of the industry sectors and having the right technical experts at that committee will better drive consensus, will better drive the discussion of technical advances in safety versus the cost which ultimately is what needs to happen if you are to crystalize the best regulatory solutions when DOT is making these decisions.

Senator KENNEDY. Well when the Tank Car Committee meets and the members do it right, let's suppose it's a safety issue. The Committee deliberates. They study it. They bring in experts, the Tank Car Committee and they reach a conclusion on a standard to recommend to DOT.

Is there just one report from the Committee or can members, is there a majority report from the Committee? Suppose a member of the Tank Car Committee disagrees but gets outvoted. Can the Tank Car Committee have a minority report?

How does it work?

Mr. ROBERTI. Well, remember FRA and PHMSA are at those meetings.

Senator KENNEDY. Right.

Mr. ROBERTI. So, we know about it. We have an open door.

Most recently, we've met with all of the industry sectors, the carriers. I was, just a few weeks ago, I met with the Fertilizer Institute at their annual conference and spoke to them.

We've met with the Railway Supply Institute most recently.

We've met with AAR officials and we're going to, I'm going to, I talked to, we'll be meeting with the American Chemistry Council in coming weeks.

The way to be successful here is to be fully engaged, maintain open dialogue. If push comes to shove and there needs to be filed a petition by any one member, then that can happen.

The better way, I think, is with Secretary Chao's leadership and your leadership, Senator, and by full engagement by FRA and PHMSA to really see if we can reach, achieve consensus on the best way forward if that really facilitates the rulemaking process.

Senator KENNEDY. Okay.

Anybody have anything more to add?

I want to ask, I want to shift gears to, we'll go back and forth.

Cost, that comes under the jurisdiction or rates, if you will, of the surface transportation board. Now, part of the problem there is the United States Senate. I think we haven't acted on some nominations to the board. Is that right?

Mr. ROBERTI. That's correct, Senator.

Senator KENNEDY. I'm going to talk to Senator McConnell about that pretty quickly and find out where we are on that.

Let me just throw this out there and it really is a question, not a suggestion.

Has the Stagger's Rail Act worked? Has the Stagger's Rail Act worked?

Mr. MCINTOSH. Senator, I can give you a perspective on that, granted, it's a shipper's perspective, so.

Senator KENNEDY. Tell everybody what it is but I'm probably the only one who needs an answer to that.

Mr. MCINTOSH. The Stagger's Act is the act that was put in place many years ago when the railroads really went from regulated set of companies, a regulated industry to a non-regulated industry.

If you go back to the 1970s, the railroads were really on their heels in terms of financial performance, in terms of, you know, returning to their shareholders some benefit from being, you know, owned.

Senator KENNEDY. Why was that?

Mr. MCINTOSH. They were, they, at the time said it was, you know, the impact of regulation.

Senator KENNEDY. Okay, I can believe that.

Mr. MCINTOSH. And as a result of that, you know, that the change in that what was brought on by the Stagger's Act, you know, allowed them some latitude and some opportunity to fix the economic model that they had operated under for many, many years.

And they've done—and you know, on the face, did a good job of helping them right the ship of, you know, their condition at the time.

And that all, if you look at the financial performance of the railroads, it's superb. I mean, if you really read their filings as public companies to the SEC, you will marvel at how much money they're making.

I'm not against companies making money. That's one of my objectives in my organization in my role.

But I think to get to the core of your question, has the Stagger's Act worked? I think it worked for a while, but I think now we're in a different environment.

The railroad industry is consolidated from tens of railroads, historically, to four, five or depending upon how you count it, major Class One railroads and the consolidation and the economic reality of today has changed, you know, the fact that the Stagger's Act which a lot of what STB does is based on the Act and interpretations of what, you know, what the Act required them to do. Those things just don't fit in today's regulatory climate and today's economic environment for the railroads.

So, I think there need to be, you know, new approaches made and one of the panelists mentioned, you know, a rate benchmarking process as an option to the current STB——

Senator KENNEDY. What is that? Who mentioned that?

Ms. GULFO. I did.

Senator KENNEDY. I don't mean to cut you off.

Mr. MCINTOSH. No, that's fine, that's fine.

Senator KENNEDY. I want to hear more about that.

Ms. GULFO. So, basically what it does when a shipper is captive you have no way to tell whether or not the rate is—it's a good benchmark for that traffic.

So, what it would do, it would give shippers the opportunity to compare what market rate will be when there's competition.

Senator KENNEDY. How do you know that?

Ms. GULFO. Well, in our experience, I mean, this is our experience when we have multiple sites that are multiple served by different railroads. When there is competition the rates are 30 to 50 percent lower than on the captive side.

Senator KENNEDY. Okay.

So, you have empirical data you can look at in other areas, okay.

And would that be something that the STB would be required to consider?

Ms. GULFO. Yes.

Mr. MCINTOSH. I think it's the hope that it would be a replacement model for the current stand-alone rate case.

Senator KENNEDY. Which costs five million bucks.

Mr. MCINTOSH. Well, yes, plus.

Ms. GULFO. Average.

Mr. MCINTOSH. Which is the only opportunity companies now have in front of the STB to challenge rates. A rate benchmarking model for which there is work being done by various entities who have an interest in looking for options would afford a different approach.

Senator KENNEDY. But why does it take three and half years and five million bucks to challenge a rate? That's absurd.

Mr. MCINTOSH. The current stand-alone rate case requirement is that if you're filing, if you're the one that's doing the filing, trying to convince the STB that the rates you're being charged is not competitive.

You have to hire consultants, in essence, to create your own independent railroad that would service the routes that you're trying to get some, you know, compensation for being overcharged and the methodology and the process required of designing your own railroad.

Everything about it, how many times the grass is mowed, how many people work, how many rail yards, what kind of rail yards and where they're located, is an onerous process that takes that amount of time.

Senator KENNEDY. Whose idea was that?

Mr. MCINTOSH. Well, that is an outgrowth of——

Senator KENNEDY. Is that STB?

Mr. MCINTOSH. I don't know. I don't know whose idea it was but it is their practice today for large company——

Senator KENNEDY. Under the Reform Bill for STB, does STB, if it has full membership, does it have the authority to say we're going to settle rate disputes a different way?

Mr. MCINTOSH. We believe that that would be the case, yes. And people in the industry are promoting different alternatives, rate benchmarking being one of them, as an option to the current process. That's the only recourse an industry has.

Senator KENNEDY. Well, in the last ten years I know our railroad, our rail carriers have consolidated, but so has everybody else. I mean, that's frankly, nothing unusual.

We have in just about every industry, the pharmaceutical industry, the healthcare industries consolidating, you know, social media platforms, everybody is merging with everybody else. It doesn't have to necessarily lead to price increases. Sometimes through economies of scale, it makes it more efficient.

Why would the rail industry be different?

Mr. MCINTOSH. Well, I can tell you that and I'll just point to the reality of the businesses that I've run over the years.

Senator KENNEDY. Yeah.

Mr. MCINTOSH. The two biggest cost components of those businesses, historically, have been the cost of electricity because we're a big consumer of electricity.

Senator KENNEDY. Right.

Mr. MCINTOSH. And the cost of freight.

Senator KENNEDY. Right.

Mr. MCINTOSH. Those two remain the two largest costs that the businesses I'm familiar with, have today.

The difference is the order is now reversed. Freight is the largest cost we have. Electricity and other raw materials is second.

Senator KENNEDY. Because of sales, the subsequent cost that it has.

Mr. MCINTOSH. The point I make and the reason that I subscribe to, you know, the failing of a non-competitive environment for rail services is the two largest costs for my business I buy without the benefit of competition.

I'm a single-sourced carrier for rail service so I have no competition.

Senator KENNEDY. You've got one choice.

Mr. MCINTOSH. One choice.

Senator KENNEDY. Okay.

Mr. MCINTOSH. And I'm a single-sourced provider for electricity.

It's a tough world when your two largest costs are single sourced just by the reality of the situation.

I don't have that luxury with my customers. I have to compete for their business.

Ms. VON DOBENECK. Senator, if I may?

Senator KENNEDY. Yeah.

Ms. VON DOBENECK. NOPB is obviously in a unique situation because we have six Class One partners so there's lots of choices there.

I just wanted to share a statistic that I had heard that since partial deregulation in 1981 that occurred, rates actually have fallen by 46 percent in today's standards.

And just as an aside, for the industry in general, we maintain in our infrastructure, we're responsible for complete infrastructure and it's 30s, well, at least for the NOPB, it's 33 to 37 percent of our yearly budget.

So, that's, you know, that's kind of, as an industry, a real consideration as we——

Senator KENNEDY. Is that like building new rail or maintain maintenance?

Ms. VON DOBENECK. Both.

And then it can go above that if you have like a big capital project that year. Last year we had one on the NOPB so it was a couple million dollars more than it normally is. So, it just depends on the year.

But just maintaining the rail as it is, is an enormous expense to us.

Senator KENNEDY. NOPB is a Class Three.

Ms. VON DOBENECK. Correct. Yes, sir.

Senator KENNEDY. So, you're, let's assume in this particular case, you're the first mile.

Ms. VON DOBENECK. Yes.

Senator KENNEDY. You can hook up with Class Ones.

Ms. VON DOBENECK. Yes, sir.

Senator KENNEDY. More than you get—you can choose more than among several?

Ms. VON DOBENECK. We have six in New Orleans which is very unique, yeah.

Senator KENNEDY. How do you pick which Class One?

Ms. VON DOBENECK. I guess it depends on whether your route is going and then you can, kind of, price out where there are different routes you can take.

Senator KENNEDY. Do you make that call or does the shipper make it?

Ms. VON DOBENECK. Oh, the shipper would.

Senator KENNEDY. Okay.

Ms. VON DOBENECK. Yes.

Senator KENNEDY. So, the shipper decides which Class Three the Class One, is to connect up with?

Ms. VON DOBENECK. Depending on the route.

Senator KENNEDY. Okay.

Ms. VON DOBENECK. They're given——

Senator KENNEDY. Having six different Class One ship rail carriers available, is that unusual, is that common?

Ms. VON DOBENECK. It's very unusual. The only other place in the country that has that kind of a set up is Chicago. So, we're really unique and really fortunate—for local industries that folks around here have the benefit of those connections and we work well with all of our Class Ones to create the gateway, we call it, so, the front belt and the back belt here in New Orleans.

Mr. MCINTOSH. Senator?

Senator KENNEDY. Yeah.

Mr. MCINTOSH. 85 percent of chemical manufacturing locations in the U.S. are single-served locations, 85 percent of them.

Senator KENNEDY. Wait, say that again.

85 percent of what?

Mr. MCINTOSH. Of the chemical manufacturing locations in the U.S. are single-served locations.

Senator KENNEDY. That means they have access to one Class One.

Mr. MCINTOSH. One and only one. No competition.

Senator KENNEDY. Okay. Alright.

I have a few other questions.

I'm still a little confused about, I think you refer to it as Appendix B. You know what I'm talking about because I don't.

[Laughter.]

Could you explain that to me? Somebody? Anybody?

Mr. MCINTOSH. Do you want me to try?

Mr. ROBERTI. Sure, if you want to start and I can weigh in.

Mr. MCINTOSH. My understanding, Senator, is the DOT issued some policy directives on the requirements for locations that do maintenance or related maintenance activities on rail cars or components thereof.

Today, typically, a chemical shipper who ships by rail has the flexibility to do maintenance for certain kinds of activity on the rail cars that they ship their products in.

Senator KENNEDY. Okay.

Mr. MCINTOSH. Obviously, for significant maintenance activities or required regulatory, you know, time-based regulatory requirements, those are typically done by a third-party shop that provides the certification that the maintenance has been done per DOT standards.

But the new policy directives which have been issued, to my understanding, have been issued by DOT calls into question the scope of what chemical manufacturers can do at their location and basically removes the opportunity to do a significant number of things which are being done now.

Senator KENNEDY. In house.

Mr. MCINTOSH. In house.

Senator KENNEDY. You have to hire an outside person to do——

Mr. MCINTOSH. Or you have to move the car to a shop to have it done at a certified shop. Those exist now but they typically do the more significant major work.

Either way, the standards which, you know, haven't really seen the regulatory requirement of cost versus benefit, you know, stand to make, you know, an additional cost burden for the shipping community because things that used to be done in-house, replacing chain on a valve gap because the chain was worn. Those are things that you will no longer be able to do as a shipper. You will have to require a mobile repair shop to come to your site, third-party, to deal with that issue.

Senator KENNEDY. And is this a proposed rule?

Mr. MCINTOSH. That's my understanding, yes.

You know, our issue is we're not adverse to engaging in what kind of activities, you know, should require some kind of certification that don't today. But, you know, this was, kind of, handed down and it's not really consistent with regulatory reform or consistent with transparency, addressing this issue of transparency.

Senator KENNEDY. Okay.

Paul, Can you shed some light on this?

Mr. ROBERTI. So, okay, yes, Senator.

So, this is an area where the Tank Car Committee has a role in conducting certifications of the—to ensure that a tank car or components are consistent with the Federal regulations. Within the scope of the certification there's a broad ecosystem of what constitutes a tank car and all the components that go into it.

This is an important safety issue because one seal or a manhole cover or even these acts that occur within a carrier's own maintenance yard could cause, they can cause a catastrophic release if not done correctly.

Now, we know it's a thorny issue. We've been talking to all stakeholders about this. We are going to continue to talk. In fact, we're going to be meeting about this issue.

Our message is we're open to solutions. Where we can prioritize safety and maximize efficiency and find a consensus that really looks at a risk-based approach to addressing this issue, we will do so. We will entertain that.

So, that's our message is that we want to continue, the Secretary, this is a matter that has the Secretary's attention. It certainly has your attention.

We have the right leadership with your help and I think both FRA and PHMSA will work with the stakeholders like we did with the phase-out issue or what the stakeholders did with coming to a consensus on the phase-out issue.

We need to find what's the right balance here and we will do so and keep your office and your staff informed as we address this issue.

Senator KENNEDY. Now tell me how all this has an impact on small business.

Ms. AMAR. Well, I think, as I mentioned in my testimony, that you know, small business owners don't only, you know, use shipping if I'm a retail grocery or you know, manufacturer which we have several members of, but I'm not talking about large manufacturers. I'm talking about small manufacturers, you know, that have 20, 25 employees that you know, want to see their goods shipped across the U.S.

This all, you know, it's kind of like the trickle down, you know, economic theory of, you know, what happens to these guys or, you know, Dow Chemical, who is here today. Their products have to get shipped out and put into stores and those products and prices impact our members, you know, our small business owners.

So, there are consumers on both sides of the issue.

And we've been involved in many different arenas. This is just one example of one.

I was involved several years ago in an issue with car manufacturers, our auto dealers and industry where we were, kind of, having like warranty repair issues.

And so, you know, it's kind of like this particular issue is somewhat of a similar issue. We had to have everybody come to the table. You've always got to have input from every single stakeholder. And I always think that when that's what occurs then you're going to have the best possible solution.

Senator KENNEDY. Okay.

Let me ask one last question then I'm going to see if anybody out there wants to say anything.

This is well, I'm just going to ask it.

If you're a petrochemical manufacturer or any kind of manufacturer and you have access to only one Class One carrier and you get a price quote and you don't like it or even if you do like it, why don't you just go compare that to trucking?

Mr. MCINTOSH. I can answer that from a real-life perspective.

In a lot of cases trucking, especially when you're talking about the volumes of chemicals that run, that move by rail, trucking costs are prohibitive. And some chemicals like chlorine, you know, we just, the industry just does not move that by truck.

Senator KENNEDY. Is it a safety issue?

Mr. MCINTOSH. It's the nature of to get the same kind of safeguards that you have in moving by rail, you would make it even more prohibitive from a cost standpoint.

Senator KENNEDY. Well, you probably will interface with more people on the road.

Mr. MCINTOSH. Yes, and you'd be in higher urban concentrations, Senator, as if you're moving product by truck.

Senator KENNEDY. Yeah. Yeah.

Ms. GULFO. Senator, if I may, in our case we have multiple sites that are captive to just one single rail option and it's a matter of volume. For each rail car that we ship we would have to ship four trucks.

So, it's a lot of trucks on the road so it adds condition to the roads and like John mentioned, becomes somewhat cost prohibitive as well.

Senator KENNEDY. Okay.

Anybody have anything they want to say?

Speak now or forever hold.

Alright, this has been great. And I want to thank all of our panelists.

I've learned a lot from listening to you. I read all of your written testimony as well and I know CRS has put out a publication, Congressional Research Service. They probably put out several but I've got one in my packet. I got about half-way through and my plane landed.

So, I'm going to go back and finish that for that usual, thorough job.

I will go back and look at my notes. I'll take this back to the Committee.

If anybody has anything to offer, I hope you'll contact me or Cassie or Marcie or Preston or Michelle or Ross or anybody else in my office.

Well, I'm interested and I think the Committee is interested in two things.

Number one, well, really three things.

Number one, public safety.

Number two, public safety.

And number three, efficiency, a subset of which is cost and I know that's DOT's concern. I know that's the rail carrier's concern. I know that's the small business and large business concern.

There's got to be a way that we can resolve some of these issues.

I am going to go back and see where we are on appointments to the STB. I frankly didn't. I think they've been outstanding for three years. Did I read that correctly?

That's inexcusable.

I want to thank Meredith again, Meredith West.

I want to thank Kathryn.

I want to thank Sean.

I want to thank Chairman Risch for allowing me to conduct this field hearing.

I want to thank Ranking Member Cardin.

I want to thank all the members of my staff for working so hard.

Two of my colleagues in my office waited on a plane in Washington, DC, for how many hours? Five hours on the plane. Seven hours.

And I was in DC yesterday. They called my office to tell Kristen that they were stuck on the plane and Kristen told me and I said, my advice is to start drinking.

[Laughter.]

And you can have a few cocktails and sober up by the time you land but they weren't serving liquor. It makes no sense.

I want to thank all of you for coming. This has been very informative.

I hope everybody has a wonderful and safe Thanksgiving.

This meeting is adjourned.

[Whereupon, at 11:46 a.m., the hearing was adjourned.]

APPENDIX MATERIAL SUBMITTED

STATEMENT FOR THE RECORD OF

EDWARD R. HAMBERGER
PRESIDENT & CHIEF EXECUTIVE OFFICER
ASSOCIATION OF AMERICAN RAILROADS

BEFORE THE U.S. SENATE
COMMITTEE ON SMALL BUSINESS & ENTREPRENEURSHIP

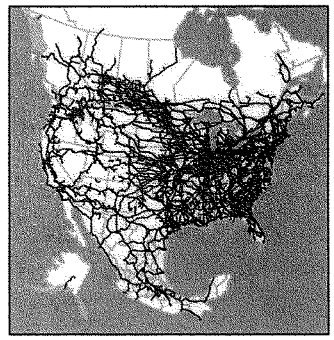
FIELD HEARING ON HOW SMALL BUSINESSES BENEFIT FROM SMART RAIL SHIPPING REGULATION

NOVEMBER 16, 2018

ASSOCIATION OF AMERICAN RAILROADS
425 THIRD STREET SW
WASHINGTON, DC 20024
202-639-2100

Introduction

Thank you for the opportunity to provide a statement for the record regarding the November 16, 2018, field hearing on how small businesses benefit from smart rail shipping regulation. Specifically, the field hearing included a discussion of the appropriate level of railroad rate and service regulation, as well as a discussion of railroad hazardous material and tank car issues. This statement will touch on both of these areas.



Small businesses, like all businesses and consumers in the United States, benefit from the nation's safe and efficient freight rail network. America's freight railroads form an integrated, nearly 140,000-mile nationwide system that serves nearly every industrial, wholesale, retail, and resource-based sector of our economy. In a very real sense, railroads are the circulatory system of the U.S. economy. Almost entirely privately owned, railroads operating in the United States provide the world's safest, most productive, and lowest-cost freight rail service. They are indispensable to our nation's economic growth.

Unlike trucks, barges, and airlines, America's freight railroads operate almost exclusively on infrastructure that they own, build, maintain, and pay for themselves. That means they must be able to earn enough to pay for the upkeep and expansion of their networks.

They have not always been able to do this. In the 1970s, the U.S. freight rail industry was on the brink of ruin, largely because of decades of excessive regulation that failed to recognize that railroads operate in dynamic, competitive transportation markets. Bankruptcies were common, and tens of thousands of rail miles had to be operated at reduced speeds because of unsafe conditions railroads could not afford to fix. The economy suffered greatly because railroads could not provide quality service.

Recognizing the status quo was untenable, Congress passed the Staggers Rail Act of 1980, which put in place a more balanced regulatory system under which railroads could plan efficient, market-based routes, services, and prices, rather than have Washington dictate operations.

Importantly, the Staggers Act kept in place effective regulatory safeguards to protect rail customers against abusive or anticompetitive railroad behavior. Those safeguards are still in place today under the auspices of the Surface Transportation Board (STB), the independent federal agency responsible for regulating rail rates and service.

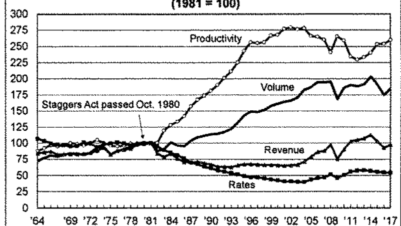
It is clear that the Staggers Act reforms have done exactly what they were supposed to do. Railroads today are moving more freight and are far more affordable, safer, reliable, and financially secure than they were prior to Staggers. The benefits they provide our nation have grown sharply too:

- Since 1980, railroads have poured more than \$660 billion — their own funds, not taxpayer money — back into their networks, creating a rail system that is the envy of the world. In recent years, rail spending has averaged more than \$500 million per week, more than ever before. Thanks to this spending, U.S. freight rail infrastructure today is in better overall condition than ever before. Indeed, the term "crumbling infrastructure" applies to many of our highways, waterways, and transit systems, but with few exceptions it does not apply to our nation's freight railroads. Prior to the Staggers Act, it did.

- According to a study by Towson University's Regional Economic Studies Institute, in 2017 alone, America's major freight railroads supported 1.1 million jobs, $219 billion in economic output, and $71 billion in wages. Railroads also generated nearly $26 billion in tax revenues in 2017.

- Rail service has become far more cost-effective for rail customers. Average rail rates in 2017 were 46 percent lower than in 1981, thanks mainly to huge productivity gains that have largely been passed through to rail customers. Millions of Americans work at firms that are more competitive in the tough global marketplace thanks to the affordability of freight railroad transportation.

U.S. Freight Railroad Performance Since Staggers
(1981 = 100)



"Rates" is inflation-adjusted revenue per ton-mile. "Volume" is ton-miles. "Productivity" is revenue ton-miles per constant dollar operating expense. "Revenue" is operating revenue in 2017 $. Source: AAR

- Railroads have become much safer. In fact, recent years have been the safest in rail history, including for the transport of hazardous materials.

- Around one-third of U.S. exports move by rail. Without rail, U.S. firms and consumers would be unable to participate fully in the global economy.

- Compensation per employee in the freight rail industry is more than 60 percent higher than the U.S. average.

- Since one train can carry the freight of several hundred trucks and railroads on average are four times more fuel efficient than trucks, freight rail is better for the environment.

<u>The Continued Need for Balanced Regulation</u>

The global superiority of U.S. freight railroads is no accident. Rather, it is a direct result of a balanced regulatory system, embodied in the Staggers Act, that relies on the marketplace to establish most rate and service standards. The level of government control over railroads has a tremendous impact on how reliably, efficiently, and cost-effectively railroads are able to meet the economy's freight transportation needs.

When the Staggers Act was passed in 1980, a move to a system of balanced regulation was necessary for railroads' very survival. Today, railroads' survival is not in doubt — railroads are financially healthy. But that does not mean the need for balanced regulation has gone away. America's ability to compete in a tough global economy requires vibrant, effective freight railroads. That is why it is crucial that the balanced railroad regulatory framework that has worked so well for nearly 40 years be retained.

Unfortunately, some firms and special interest groups are trying to tilt today's regulatory and legislative scales in their favor. These groups claim to have only the best intentions. They only want "common sense reforms" based on "free market principles" that will lead to more "competition" that will "ultimately help the economy and the rail industry itself." They insist they "want railroads to be prosperous and invest in their network and service." They just want to "get freight rail policies back on track" through a "closer examination from Congress and the STB."[1]

These innocuous-sounding claims are belied by the fact that when one looks at the actual policy changes that rail industry critics are urging upon the STB and Congress, it is clear that "reform" is a euphemism for government intervention in the marketplace.

At their most basic level, proponents of railroad "reform" think railroads charge too much; that the use of differential pricing by railroads is unfair; and that the government should step in and institute price controls of one kind or another on railroads. In doing so, proponents of "reform" seem to discount the notion that a railroad must balance the desires of each customer to pay the lowest possible rate with the need to earn a sufficient return to keep the rail network functioning now and into the future. Rhetoric about "competition" cannot change the fact that railroads must be able to cover their costs or they will not be able to maintain or expand their infrastructure and provide the services upon which their customers and our nation depend.

Rail industry critics, including two who testified at the November 16 field hearing, also often claim that service to a rail customer by a single railroad is equivalent to monopoly power. The implication is that all rail customers therefore have a right to service by more than one railroad. That is wrong. Claiming every market can sustain two railroads just because some markets can is like saying every city can support two major league baseball teams just because New York and Chicago can.

Moreover, customers that decide to build facilities at locations served by one railroad still benefit from competition in a variety of ways. The majority of freight shipped by rail can also be shipped by another mode of transportation such as truck or barge. And freight often can and is transloaded from one of those other modes to a second or third railroad option. Shippers can also avail themselves of substitute products or buy and sell products into and from different geographic regions, which increase their transportation options and constrain what freight moves by rail. To illustrate this point, the huge increase in electricity generation from natural gas (which is not carried by railroads) instead of coal (which is) is an example of product competition that has led to the loss of millions of rail carloads of coal in recent years. All of these forces put competitive constraints on railroad pricing and service.

Railroads know their customers are not always completely satisfied with the prices they are able to negotiate with railroads. Virtually every purchaser of goods or services, including railroads, would like to pay less to their suppliers. But there is no question that the vast majority of rail customers — including those served by only one railroad — do not need STB regulatory protection because market forces ensure competitive rates and service. When that is not the case, the STB can set maximum rates or take other actions if a railroad is found to have acted improperly.

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[1] The phrases in quotes in this paragraph are from statements from the two chemical companies at the November 16 field hearing.

Mandated Switching Should Be Opposed

Some rail industry critics have been calling for the reregulation of U.S. freight railroads, in one way or another, since the Staggers Act was passed. Most recently, many of them have proposed something called mandated terminal switching.

A terminal area is a location where railcars are transferred, collected, or delivered, often in so-called "first-mile" or "last-mile" movements. Terminal areas are usually owned and operated by a single railroad. "Switching" is when one railroad moves freight into or out of a terminal area on behalf of another railroad.

Today, if a railcar must be moved by two or more railroads to get from its origin to its final destination, the railroads must cooperate to do so. But longstanding law and STB policy says that unless a railroad is extremely inefficient or has engaged in anti-competitive conduct, it does not have to switch traffic with another railroad if it can deliver the freight from origin to destination all by itself.

Mandated switching is when a railroad that can carry freight all the way from origin to destination by itself (the "incumbent railroad") is ordered by the STB to switch traffic with another railroad that has replaced the incumbent for part of the move.

To state it more simply, mandated switching entails government regulators forcing one railroad to use its own tracks, locomotives, and other assets so that a competing railroad can take the first railroad's customers away. In essence, it is analogous to the government forcing UPS to use its local delivery trucks to deliver packages for FedEx.

Mandated switching is more accurately called "forced access," because the incumbent railroad would be forced by the government to give another railroad access to the incumbent's facilities, even if the incumbent had done nothing wrong — that is, even if it had not even been accused, much less found guilty, of engaging in anti-competitive conduct or charging excessive rates.

Why is mandated switching a problem? First, railroad efficiency and the quality of rail service would be sharply reduced. If UPS had to use its trucks to deliver FedEx packages, UPS's operations would clearly be disrupted. In the rail case, the disruptions would be orders of magnitude greater because of the time and complexity inherent in switching rail traffic. (A single mandated switch could involve dozens of distinct railroad movements over several days).

Second, under mandated switching, railroads that invested in infrastructure and equipment to serve their customers would be forced to use those same assets for the benefit of other railroads. No private company would invest in new assets if it had to let a competitor reap the benefits of those investments. Pepsi would not build a new bottling plant if it might be ordered by the government to use the plant to bottle Coke.

Third, highways may become even more crowded as delays caused by the inefficiencies of mandated switching could cause many rail customers to switch to trucks.

Imagine the billions of dollars in new highway spending that would be needed to handle increased truck traffic.[2]

Minimum Service Requirements

Railroads have what is called a "common carrier" obligation. In essence, this means that if a rail customer asks a railroad to haul freight for it, the railroad (unlike a trucker or barge operator) generally cannot say no.

However, a witness at the November 16 field hearing implied that railroads' existing common carrier obligation should be expanded to include what the witness called a "minimum service requirement." This might include legislative or regulatory mandates regarding railroad service levels, presumably including some sort of punishment for railroads that failed to meet those requirements.

First of all, there are existing statutory and regulatory protections for shippers who receive unreasonable service. Service issues have long been regulated in appropriate circumstances under the existing common carrier obligation and other provisions of the Interstate Commerce Act. The STB may decide complaints that railroads have violated their statutory obligations or caused unreasonable delay. In extraordinary circumstances, the Board has authority to issue emergency service orders when it finds that a "failure of traffic movement exists which creates an emergency situation of such magnitude as to have a substantial adverse effects on shippers, or on rail service in a region of the United States." 49 U.S.C. § 11123(a). Moreover, the STB has recently been given authority to launch investigations on its own motion regarding issues of national or regional significance.

That existing set of legal protections aside, railroads know that, over the past couple of years, rail service for some customers in some locations has not been of the quality they have come to expect, or that railroads themselves expect. Railroads regret this. However, railroads are constantly striving to improve the strength and resiliency of the national rail network, making it better able to provide the efficient, reliable, and cost-effective freight transportation service that rail customers, and our nation, need.

Additional laws, in the form of mandated service standards, though, are not the way to go, especially if they were imposed with no obligation on rail customers to pay for the assets railroads would need to meet those standards.

Every day, a huge variety of factors influence rail service levels. For example, railroads and their customers do their best to forecast future demand to help ensure that railroads have enough assets to handle the traffic tendered to them. At times, though, demand for rail service exceeds railroad and shipper expectations.

Unforeseen events also hinder railroads, just as they hinder other firms. The U.S. rail network is, in effect, a 140,000-mile outdoor assembly line. Events over which railroads have little or no control — such as bad weather, accidents, mine shutdowns, port congestion, strikes, and much more — can impede rail operations for days, weeks, or, in the worst cases, even months at a time. Seasonal factors can also play a role — *e.g.*, grain harvests can

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[2] Already, the taxes and fees that heavy trucks pay are far less than the cost of the damage they cause to our nation's highways. This multi-billion-dollar annual underpayment would rise if freight that otherwise would move by rail moved by truck instead.

quickly fill a rail network to capacity, much like a church might fill to overflowing on Easter Sunday.

When railroads experience an unexpected surge in traffic or unexpected problems, they may be temporarily unable to meet their customers' requests as quickly as they or their customers might like. Firms in every industry periodically find themselves in similar situations, but some rail critics would make this a violation of law if it happened to railroads.

Even more problematic, many of the same entities that want to impose service obligations on railroads also support changes in rail regulation that would sharply curtail rail revenue, making reliable and efficient service even more difficult to achieve.

Misperceptions Regarding Freight Rail

It is an unfortunate reality that, when trying to make their case, rail industry critics sometimes resort to misleading claims. For example, at the field hearing, the claim was made that rail rates have risen "more than three times the rate of inflation" over the past decade.

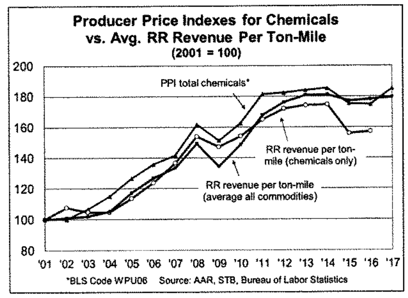
No one disputes that rail rates have risen on average in recent years. But as noted above, America's privately-owned freight railroads operate almost exclusively on infrastructure that they own, build, maintain, and pay for themselves. Higher rail earnings, made possible in part by those higher rail rates, have enabled railroads to plow back record amounts to keep the U.S. freight rail network in world-best condition.

This becomes especially important when railroad markets are undergoing fundamental shifts, like they are now. Demand for rail service is a function of demand elsewhere in the economy for the products railroads haul. Demand changes on a micro scale all the time as individual firms rise and fall. It also occasionally changes on a grander scale. The rail industry is in the midst of one of those macro-scale changes now, with coal in the midst of a steep decline and intermodal volumes at record levels and expected to continue growing in the years to come. If the commodities with rail traffic declines traveled on the same routes as commodities with traffic increases, the challenges these changes presented to railroads' operating plans and investment needs would have less impact. However, when traffic changes occur in different areas — as is the case today — the challenges are magnified. The ability of railroads to make the investments needed to respond effectively to those challenges would be threatened if railroads' ability to price their services based on market demand were unreasonably curtailed.

It should also be noted that railroads set their prices based on the value they provide to their customers, not on their input costs. Firms in virtually every industry do the same thing.

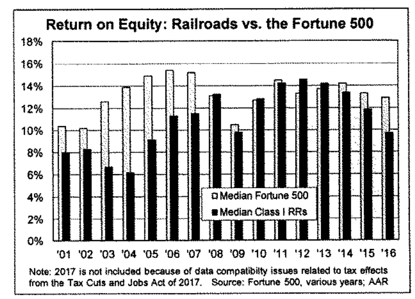
Notably, some of the rail customer groups who complain about railroad rate increases in recent years have seen the prices they charge increase just as fast, if not faster. For example, according to data from the Bureau of Labor Statistics, average prices for chemicals, as measured by the producer price index for chemicals, rose 85 percent from 2001 to 2017 (see the top chart on the next page). Meanwhile, average railroad revenue per ton-mile, unadjusted for inflation, rose 79 percent over the same period. Average rail revenue per ton-mile for chemicals rose 57 percent from 2001 to 2016, much less than the comparable increase in the producer price index for chemicals over the same period. In other words, the rail rate increases appear to be less than the chemical industry's own price increases over the same period.

Rail industry critics are also misleading when they claim, as they did at the field hearing, that railroad consolidation has led to skyrocketing rates and substantially increased rail market power. Freight railroads have consolidated over the past 35 years like most U.S. industries. Rail mergers have not, however, reduced intra-railroad competition. Because of conditions placed on every major post-1980 rail merger, shippers that had multiple railroads serving them prior to the merger still had multiple-railroad service following the merger. The precedent that rail customers should not go from two-railroad service to one via a rail merger is so well established that in the most recent major rail mergers, the merging railroads addressed such situations even before applying to the STB for approval. It is simply wrong to claim that rail shippers would be better off today if the fractured, inefficient freight rail system that existed in the past still existed.



Rail industry critics also imply that rail profits are now excessive. It is true that freight railroad financial performance in recent years has been much improved compared to earlier years. But statements about railroads' recent profitability often ignore the fact that, until relatively recently, rail profitability was generally poor. Thus, an improvement from earlier years may be substantial, yet may still yield profitability levels that are only about average compared with other industries against which railroads compete for capital.

One example that illustrates this point is return on equity (ROE), a well-known measure of profitability. ROE reveals how much profit a company generates with the money shareholders have invested. The nearby chart shows that the ROE for the rail industry reached parity with the Fortune 500 average for several years, but more recently has again fallen behind the Fortune 500 median.



Any discussion of railroad profitability relative to other industries has to take into account the extremely capital-intensive nature of the railroad industry. (The average U.S. manufacturer historically spends about 3 percent of revenue on capital expenditures. The comparable figure for U.S. freight railroads in recent years has been around 19 percent, or six times higher.) One measure of profitability that does take into account railroads' capital intensiveness is return on invested capital (ROIC). It shows that railroad returns are not excessive and still lag behind those other industries.

Make no mistake, the rail industry is encouraged by the improvements in its financial condition in recent years, and they will work to see that those improvements continue. Recent improvements in rail earnings should not be seen as a reason to cap rail earnings through price controls, artificial competitive constraints, or by other means. This would encourage capital to flee the industry, threatening railroads' ability to reinvest in their networks. Indeed, if the U.S. freight railroad industry is to fully deliver its potential benefits to the economy, its current financial performance should be regarded as one step along the path toward sustainability, not as a final destination.

It is important to note that major freight railroads are either publicly traded or are subsidiaries of publicly traded companies. As such, they must provide their shareholders a return commensurate with what those shareholders could obtain in other markets with comparable risk. No law or STB regulation can force investors to provide resources to an industry whose returns are lower than what the investors can obtain elsewhere. Capping rail rates in any fashion would send an unambiguous signal to capital providers that railroads are a risky bet. If railroads are viewed as returning less to shareholders, for whatever reason, than comparable alternatives, then capital will flee the rail industry or will only be available at much higher costs than we see today.

Finally, some critics claim that the STB rate review process is broken. The STB has recognized, and railroads agree, that the procedures it uses in large rate cases — when hundreds of millions of dollars might be on the line — are not appropriate in all cases, especially when the amount at issue is relatively small. In response, the STB has instituted alternatives for smaller cases that are far less expensive and time consuming. In addition, the AAR has recently advocated that the STB make specific improvements to expedite and streamline even its largest cases as the agency considers ways to improve its processes. Railroads support making the STB rate and service adjudication processes accessible to all shippers, but the procedures used must be based on sound economic principles.

Moving Hazardous Materials Safely

U.S. railroads transport approximately 2.3 million carloads of hazardous materials annually, including approximately 70,000 carloads of "toxic inhalation hazard" (TIH) materials.[3] Railroads are the safest mode for transporting hazardous materials. In 2017, more than 99.999 percent of rail hazmat shipments reached their destination without a release caused by a train accident. Thanks to the combined efforts of government and industry, rail hazmat accident rates in 2017 were down approximately 64 percent from 2000.

Federal law authorizes the Secretary of Transportation to "prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce." The Secretary has delegated this authority to the Pipeline and Hazardous Materials Safety Administration (PHMSA), which issues the hazardous materials regulations governing the transportation of hazardous materials by all modes, including rail.

PHMSA and the Federal Railroad Administration (FRA) work together to develop regulations addressing the risks posed by the transport of hazardous materials by rail. AAR's member railroads are committed to following PHMSA's hazardous materials regulations. At the same time, though, DOT itself has recognized that PHMSA's hazardous materials regulations establish minimum standards which industry may exceed in the interest of safety.

[3] TIH materials are gases or liquids, such as chlorine and anhydrous ammonia that are especially hazardous if released into the atmosphere.

In this regard, the AAR's Tank Car Committee brings together industry experts to support and improve the safety of tank cars, which transport the hazmat railroads are required by the common carrier obligation to carry. The committee is comprised of railroads, rail car owners, rail car manufacturers and repair facilities, and rail hazmat customers, with active participation from the U.S. DOT, Transport Canada, and the National Transportation Safety Board (NTSB). In other words, all the key tank car stakeholders are represented. It is worth nothing that during the field hearing, the PHMSA witness described the tank car committee as "useful and important."

The rail industry takes very seriously its responsibility to transport hazardous materials posing toxic inhalation hazards as safely as possible. That is the main reason why, when the safety of the rail network demands it, the tank car committee has promulgated standards associated with tank cars that are above and beyond federal standards. This has only happened following extensive consultations with all relevant stakeholders, including relevant government agencies and tank car owners.

In August 2016, a group of tank car owners and others filed a petition with DOT regarding the tank car committee. At the November 16 field hearing, one witness mischaracterized this petition, arguing it "would allow for an open and transparent discussion on TCC reform." To clarify, the petition asks DOT to promulgate a rule prohibiting private parties from agreeing to voluntarily exceed regulatory requirements when it comes to enhanced hazardous materials safety measures. Railroads oppose the petition because it is contrary to PHMSA's safety mission and exceeds PHMSA's statutory authority.

The development and implementation of standards for tank cars carrying TIH materials show the rail industry's commitment to working with shippers to enhance safety using the DOT regulatory process. Several years ago, the tank car committee promulgated rules designed to encourage the replacement, over time, of less safe TIH cars with new cars that had enhancements designed to limit releases during an accident. A key point of contention was how long the phase-out period should be for the older cars. Working with government officials, tank car builders, chemical firms, and others, interested parties agreed in early 2018 to a phase-out schedule. Contrary to the impression given by some at the field hearing, this was not a case of railroads unilaterally forcing their will on chemical firms. Rather, it was a collaborative process with the active participation of relevant government regulators at PHMSA and DOT, fully consistent with DOT regulations.

The New Orleans field hearing also touched on DOT's definition of tank car facilities as it impacts the AAR tank car facility certification program.

Federal regulations require that facilities engaged in the manufacture, repair, inspection, testing, qualification, and maintenance of rail tank cars used to transport hazardous materials must implement a quality assurance (QA) program that is approved by the AAR. The AAR has a robust audit program to confirm that tank car facilities have implemented the QA program as required by DOT. AAR's audits also address a tank car facility's ability to perform its technical functions in compliance with federal hazardous materials safety regulations and other standards.

Recently, DOT clarified the scope of its tank car facility definition, which in turn dictates the scope of AAR's delegated responsibilities regarding tank car quality assurance. This DOT clarification coincided with an AAR initiative to revise the process for tank car technical audits. This audit procedure is addressed in the AAR Manual of Standards and Recommended Practices, Section C-III, M-1002, Appendix B. The new version of Appendix B reflects DOT's guidance regarding which tank car facilities require AAR certification.

At the field hearing, one witness erroneously claimed that the AAR's Tank Car Committee is "imposing new requirements that inappropriately expand the scope of regulation for routine functions performed at rail shipper facilities." Rather, the AAR works closely with DOT on the scope of AAR's tank car facility certification program, and the Appendix B revision reflects that coordination and DOT's guidance. More specifically, on September 4, 2018, PHMSA issued Interpretation Letter 18-0029, which provides a formal confirmation of DOT's assessment of the scope of entities defined as tank car facilities. The revisions to Appendix B are fully consistent with that guidance.

Conclusion

The AAR appreciates the opportunity to provide the perspective of America's freight railroads on the important topics raised in this hearing.

America's freight railroads are the envy of the world, delivering economic growth, supporting job creation, and providing crucial environmental benefits such as reduced highway gridlock and cleaner air. America's economy cannot function well without reliable, financially healthy freight railroads. Having financially healthy railroads, though, requires a regulatory system that relies as much as possible on the free market instead of heavy-handed government oversight. It is crucial that there be an appropriate regulatory balance between protecting rail customers against improper railroad behavior, on the one hand, and allowing railroads to use their assets and price their services in ways that will enable them to earn enough to pay for all the things a world-class rail network requires.

Safety, though, is most important of all: nothing is more important to railroads than the safety of their employees, their customers, and the communities they serve. Railroads will continue to aggressively seek ways to enhance railroad safety, especially as it pertains to the transport of hazardous materials. Railroads believe that all participants in the hazmat logistical chain, working in conjunction with the appropriate government agencies, must accept responsibility to take a comprehensive, holistic approach to hazmat safety.

Testimony of:

The American Chemistry Council
The American Fuel & Petrochemical Manufacturers
The American Petroleum Institute
The Chlorine Institute
The Fertilizer Institute
The National Industrial Transportation League

Before the
United States Senate
Committee on Small Business & Entrepreneurship

Field Hearing on
"How Small Businesses Benefit from Smart Shipping Regulation"

Port of New Orleans
November 16, 2018

The American Chemistry Council (ACC), the American Fuel & Petrochemical Manufacturers (AFPM), the American Petroleum Institute (API), the Chlorine Institute (CI), The Fertilizer Institute (TFI), and the National Industrial Transportation League (NITL) are pleased to provide testimony for the Senate Small Business Committee's Field Hearing on "How Small Businesses Benefit from Smart Shipping Regulation." We thank Senator Kennedy and members of the Committee for holding this hearing and for your consideration of written testimony from impacted stakeholders.

ACC, AFPM, API, CI, TFI, and NITL are national trade associations representing chemical and energy producers and agricultural input and production industries.[1] Our industries are among the largest freight rail shippers. Thousands of small businesses and farmers rely on the timely and economic delivery of essential goods such as fertilizer, petroleum products, chlorine and other chemicals produced by our member companies. We need smart policies to help ensure a strong, safe, and competitive rail network.

The following testimony addresses a number of key challenges faced by our member companies and other freight rail shippers. The Committee has an important oversight role in looking at the impact of freight rail policies on small business. We look forward to working with you to address these challenges.

Tank Car Standards Must Be Established through DOT Rulemaking

We are committed to the safe transportation of hazardous materials by rail. Our member companies lease, own, and maintain tens of thousands of rail tank cars in what constitutes the vast majority of rail tank cars in North America. We look to the Department of Transportation (DOT) to establish uniform national standards for hazmat transportation safety, including tank car requirements.

➢ *DOT should clarify its sole authority to impose tank car requirements.*

While Congress has given rulemaking authority to the DOT to establish tank car standards, we are concerned that DOT has allowed the Association of American Railroads (AAR) to usurp this role. Railroads have acted unilaterally through the AAR's Tank Car Committee (TCC) to impose requirements on other stakeholders, even moving to prohibit the use of tank cars that meet all applicable DOT safety standards. These *de facto* regulatory requirements are adopted without cost-benefit analysis and without the due process assurances of a Federal rulemaking process.

AAR's delegation of authority from DOT is premised on bringing together expertise from rail carriers, tank car builders, tank car lessors and tank car shippers. The appropriate role for the TCC is to review proposed changes to specifications and then make recommendations to DOT for consideration. Instead, AAR acts without a consensus of TCC members to impose requirements on other industries. Such actions seriously undermine the ability of the TCC to continue its essential, collaborative work and call into question the legitimacy of the current TCC.

The TCC is dominated by railroad interests. In fact, 13 of the 23 voting seats are held by individual railroads and their trade associations. According to the Committee's charter, no vote can even occur unless a railroad majority is present. This lack of balance has given the rail industry the ability to unilaterally impose tank car requirements over the objections of other affected stakeholders. This situation is even more troubling given the fact that railroads to not own a significant number of tank cars and therefore do not bear the costs associated with modifying the fleet.

In August of 2016, a broad coalition of shipper organizations petitioned DOT to adopt clear rules protecting the Department's exclusive authority to set uniform national standards for the transportation of hazardous materials. The petition asks DOT to adopt new rules that explicitly prohibit any party from imposing tank car requirements that are different from DOT rules. The proposed changes would clarify what is already inherent in the law, that DOT has the sole authority to establish tank car standards.

We urge DOT to respond to the rail shippers' petition and initiate a rulemaking that would allow for an open and transparent discussion on TCC reform. Rules for hazmat transportation, including uniform national tank car standards, should be developed through DOT rulemaking. The federal rulemaking process allows for a full consideration of relevant data and stakeholder perspectives to help ensure that new requirements are achievable, will provide meaningful safety improvements, and are in the public interest.

➢ *DOT should ensure that its requirements for tank car facility certification minimize unwarranted regulatory burdens.*

Under DOT's Hazardous Materials Regulations, maintenance, repair, and qualification of a DOT-specification tank car must be performed by a tank car facility with a quality assurance program approved by the AAR. To comply with this requirement, tank car facilities maintain AAR certification for specific tank car activities.

DOT previously clarified that the definition of a "tank car facility" does not include a shipper facility where pre-trip inspections are performed. Specifically, a 1995 rulemaking states:

> *Several commenters asked RSPA to clarify whether or not a tank car facility includes a shipper's loading facility* ***where items such as gaskets and manway bolts are normally inspected and replaced as part of a "pre-trip" inspection. It is not the intention of RSPA to include within the definition of a tank car facility a shipper's facility where pre-trip inspections are performed****. Generally, a tank car facility evaluates the tank structure to ensure that, if serious fatigue, corrosion, or accidental damage occurs within the inspection and test interval, the remaining structure can withstand reasonable loads without failure or excessive structural deformation. A shipper, on the other hand, ensures by inspection that the tank is in proper condition for transportation from point of origin to destination. . . . A shipper that inspects a tank car solely to ensure that the tank car is safe for transportation is not performing a periodic qualification function. On the other hand, a shipper who continues the qualification of a tank car, by performing a function described in Parts 179 or 180, meets the definition of a tank car facility.* [60 Fed. Reg. 49064]

This language appropriately distinguishes between maintenance activities that must be performed by tank car facilities, and activities performed at a shipper facility as part of a pre-trip inspection. It clearly recognizes that pre-trip inspections can include the *replacement* of certain items, including, but not limited to, gaskets and manway bolts.

The Federal Railroad Administration has recently stated its position that the replacement of any tank car component covered by the DOT's hazardous materials regulations, including a manway bolt, is a maintenance function and therefore must be performed by a certified tank car facility. This interpretation conflicts with the regulatory language on pre-trip inspections cited above. If adopted, it will impose significant new regulatory burdens on tank car shippers without providing any additional safety benefit. Shippers would need to send their tank cars to a certified repair shop more frequently, which could hold the tank cars for several months and result in service delays. These service delays have significant implications for our members and their customers.

DOT should ensure that its regulatory interpretations remain consistent regarding pre-trip inspections. Clearly, pre-trip inspections can include the replacement of manway bolts. Similarly, other fasteners as well as secondary closures (e.g., plugs and caps) are also inspected and replaced as part of pre-trip inspections. These activities should not be considered tank car maintenance and should not require facility certification. DOT should ensure that its regulatory interpretations on tank car maintenance minimize regulatory burdens without compromising the Department's highest priority of safety.

➢ *DOT should complete work on key rules for TIH tank cars.*

Critically important products, including anhydrous ammonia fertilizer and chlorine, are classified as toxic inhalation hazard (TIH) materials and shipped in specially designed rail cars. In March of 2009, DOT issued updated design requirements for all newly built TIH cars. These design specifications, known as HM-246, were designated as an "interim" standard in light of a wide range of ongoing tank car research projects sponsored both by DOT and industry. Since then, the results of that research have supported the HM-246 standard as the most feasible means to achieve increased safety and accident survivability for TIH tank cars.

We are pleased that DOT recently issued a Final Rule (HM-219A) that extends the allowable service life of the "interim" TIH tank cars to the full service-life of all other tank cars. DOT previously limited the service life of these cars to 20 years. Extending the service life provides an economic incentive for further investment in tank cars with improved crashworthiness.

DOT must now address other pending rulemakings on TIH tank cars. On December 16, 2016, ACC, CI and TFI joined with AAR and the Railway Supply Institute on a petition asking DOT to make the HM-246 tank car specifications a ''final'' standard. In addition, ACC, TFI, and CI joined with AAR to file comments asking DOT to establish a phase-out date of ***December 31, 2027***, for legacy TIH tank cars built prior to the HM-246 standards. Unlike an earlier deadline imposed unilaterally by the AAR's Tank Car Committee, the proposed December 31, 2027, deadline is supported by all stakeholders.

To provide greater certainty to all stakeholders, we strongly urge DOT to move forward as quickly as possible to complete these rules.

We Need Smart Policies to Promote Freight Rail Competition and to Resolve Disputes between Railroads and Shippers

Congress created the Surface Transportation Board (STB) to help foster a healthy and competitive freight rail system. Critical STB responsibilities include ensuring efficient rail service, reasonable rates, and when necessary, a timely and equitable way to resolve disputes between freight rail companies and shippers. Unfortunately, many of the Board's procedures are too slow, too burdensome and too unworkable to meet these responsibilities.

More recently, Congress passed the STB Reauthorization Act of 2015 with broad bipartisan support. This legislation provides the Board with additional tools and authority to address challenges of the modern freight rail system. Additional action is needed now by both Congress and the STB to achieve this vision.

- *The Senate should confirm pending STB nominations.*

The STB currently has three of its five seats vacant. Until these vacancies are filled, meaningful policy reforms remain on-hold. President Trump has nominated three well-qualified candidates to fill these critical positions. The nominees passed through their confirmation hearings with unanimous, bipartisan support. We urge the full Senate to move quickly to confirm these nominees and give us a fully staffed STB.

- *The STB should adopt long-awaited reforms that reduce bureaucratic red tape and increase the efficiency and effectiveness of Board procedures.*

Once new Board members are confirmed, the STB should move forward as quickly as possible to address critically needed reforms. Existing Board procedures are overly-burdensome and fail to provide a meaningful path for a shipper that lacks transportation options to challenge an unreasonable rail rate or to request access to competitive rail service.

> <u>Reciprocal Switching</u>: Reciprocal switching, also known as competitive switching, would allow, under certain circumstances, a shipper that is served by a single major railroad to request to have its freight "switched" to another major railroad at a nearby interchange. Access to switching empowers rail customers to choose a freight rail carrier that provides the most competitive rates and best service. Such market-based competition can lead to innovation and increased efficiencies—just as it does throughout all sectors of the U.S. economy. Moreover, reciprocal switching has been utilized in Canada since 1904 to the benefit of Canadian shippers and carriers.
>
> While Congress expressly authorized reciprocal switching as a tool to advance competitive rail markets, the STB's existing rules are so burdensome and unworkable, that no shipper has ever successfully gained access to switching. As stated by the Board itself, these rules have "effectively operated as a bar" rather than as "a standard under which [switching] could be granted."
>
> We urge STB to complete work on its 2016 proposal that provides a practical blueprint for shippers to request reciprocal switching. Adopting this policy will provide businesses with more shipping options and will support a strong and competitive freight rail system.
>
> <u>Rate Review Procedures</u>: STB Chairman Ann Begeman perfectly encapsulated shipper concerns when she stated that the Board's rate review process "is too costly, too time consuming, and too unpredictable." The heart of the problem is the Board's arcane Stand-Alone-Cost (SAC) rate standard. To successfully challenge a rate, a shipper must design, on paper, an entire railroad business, and prove that this make-believe railroad could serve the same traffic at a lower cost than the rates charged by the existing railroad.
>
> Because of the incredible complexity involved, SAC has been characterized as 'a full employment bill for economists.' Recent SAC cases for chemical shippers have taken an

average of 5 years to complete and cost each shipper well over $5 million. No chemical shipper has won a SAC case, even when challenged rates were nearly nine times as high as the railroad's cost for those shipments.

We support the STB's ongoing efforts to streamline and improve its existing rate case procedures. However, the STB should prioritize efforts to develop alternatives to SAC that are more economically sound and not so inherently complex, costly and time consuming. We strongly urge the Board to consider an alternative rate review standard that would employ Competitive Rate Benchmarking. Under this approach, the STB would judge the reasonableness of rates using real world data on rates charged in competitive markets.

Emergency Service Orders: Rail service is an ongoing challenge. Shippers need effective remedies, especially when a serious disruption in service threatens a facility's operations. Railroad service problems during the winter of 2014-2015 and the more recent problems on CSX and other railroads highlight what is at stake. Numerous rail customer facilities were forced to cut production and even shut down operations. As a result, large and small businesses suffered millions of dollars in economic harm.

The STB has the power to grant a shipper access to an alternative rail carrier during a service emergency. Unfortunately, despite these dire situations, no shipper has asked STB for relief. Many have simply concluded that the Board's regulations are unworkable. A months-long process is too long when a facility faces a production cut or an immediate shutdown.

We urge the Board to establish a significantly expedited process to address immediate service emergencies. The primary focus would be to prioritize delivery of railcars needed to prevent a plant shutdown. The STB should also signal its willingness to award damages to shippers harmed by service failures that are within the railroad's reasonable control. This would provide greater weight to customer needs for railroads that face few, if any, consequences for their service failures.

Again, we thank Senator Kennedy and members of the Committee for holding this important hearing. We look forward to continuing to work with you to find solutions that will improve the situation for rail shippers and their large and small business customers.

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[1] ACC represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, and pursues safety enhancements through a risk-based framework for every aspect of hazmat transportation. The business of chemistry is a $526 billion enterprise and a key element of the nation's economy. It is one of the nation's largest exporters, accounting for fifteen percent of all U.S. exports.

AFPM is a national trade association representing approximately 400 companies that comprise virtually all U.S. refining and petrochemical manufacturing capacity. AFPM's members supply consumers with a wide variety of products that are used daily in homes and businesses. They rely on a secure, uninterrupted, and plentiful supply of raw materials to produce products that are consumed both here and abroad.

API is the only national trade association representing all facets of the natural gas and oil industry, which supports 10.3 million U.S. jobs and nearly 8 percent of the U.S. economy. API's more than 600 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation's energy and are backed by a growing grassroots movement of more than 47 million Americans.

CI is a 190-member, not-for-profit trade association of chlor-alkali producers worldwide, as well as packagers, distributors, users, and suppliers. The Institute's North American Producer members account for more than 93 percent of the total chlorine production capacity of the U.S., Canada, and Mexico. Chlorine and related chlor-alkali chemicals are used throughout the U.S. economy and are key to the protection of public health. CI's long term transportation goal is to maintain the ability to transport chlorine and other mission chemicals in a safe and secure manner while seeking areas for cost justified risk-based safety enhancements.

TFI represents the nation's fertilizer industry, which includes companies that are engaged in all aspects of the fertilizer supply chain. Fertilizer is a key ingredient in feeding a growing global population, which is expected to surpass 9.5 billion people by 2050. Half of all food grown around the world today is made possible through the use of fertilizer. The U.S. fertilizer industry generates more than $154 billion in economic benefit each year and provides approximately 89,000 direct jobs and 406,000 indirect jobs for a total of 495,000 U.S. jobs. TFI's full-time staff, based in Washington, D.C., serves its members through legislative, educational, technical, economic information and public communication programs.

NITL is the nation's oldest association of shippers using all modes of transportation in both domestic and international commerce. Founded in 1907, the League is known as The Shipper's Voice. As an advocacy organization its mission is to advance the views of shippers on freight transportation issues and enhance their professional development.